

NUMBER 624

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IN THE  
**Supreme Court of the United States**  
October Term, 1911

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LEO MEYER, AS AUDITOR OF THE STATE OF  
OKLAHOMA,  
*Appellant,*

VS.

WELLS FARGO EXPRESS COMPANY

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**SUPPLEMENTAL MOTION TO ADVANCE  
BY APPELLANT**

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Comes now the appellant and moves the court to advance this cause for early argument and in supplement to the motion already made, adds this:

At this time there is a deficit in the funds of the State of Oklahoma for payment of the current expenses of something more than three million dollars.

If the law involved in this case is upheld, under it there will be collected almost enough to liquidate such deficit.

The deficit was caused by the failure to collect taxes under this law, and other tax laws, whose validity is contested.

The indebtedness was created under the belief that the laws were valid, and the collections would be made thereunder. These collections were restrained by the injunction in this and similar actions.

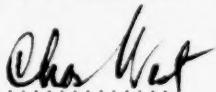
This indebtedness ought not to be lifted by other taxation until it is made clear by a decision of this court that the proposed method of taxation is improper.

Meantime the interest on the unpaid indebtedness is very burdensome to a new state of undeveloped resources, the working of whose inter-operating parts is new and unseasoned.

The large unpaid current indebtedness is working a great impediment to the government of the state, as well as to a very large number of individuals concerned. These matters are explained at length in two letters of

the Auditor of the State, dated November 3, 1911, and November 4, 1911, herein attached and marked Exhibits "A" and "B."

It is requested that the motion to advance filed October, 1911, be again considered by the court in connection with what is here stated.



.....  
*Attorney General of the State of Oklahoma.*

*Counsel for Appellant.*

Service of above accepted this.....day  
of ..... and consent hereby is given  
that it may be presented to the court at any time.

.....  
*Attorneys for Wells Fargo Express Company.*

"EXHIBIT A."

STATE OF OKLAHOMA,

Office of

State Auditor,

Oklahoma City Nov. 3, 1911.

To the Attorney General,

Sir:—

In reply to your inquiry as to what amount of the present deficit in the revenue of the State is caused by the injunction against the collection of gross revenue taxes, allow me to state that I cannot answer this with exactness, for the reason that on the advice from your office, the former State Auditor thought it prudent not to incur the expense of additional law suits involving the validity of this tax, until the Wells-Fargo suit was determined in the court of final appeal. For this reason, many of the large corporations, such as railroads, telegraph companies, private car companies, oil and gas pipe line companies and various other concerns affected by this tax have not sued because warrants have not been issued against them and will not be issued while the above named suit remains undetermined.

In a general way, however, I can state that the major portion of the present deficit which is approximately \$3,000,000 is involved, directly or in-

directly, in the various advalorem, gross revenue, inheritance, income, graduated land and license tax cases pending in our different courts. Of these suits, the largest portion of the taxes are involved in the gross revenue cases covering the years 1909, 1910 and 1911. I estimate from the tax suits now pending, and the other collections of this character that would probably be made if this law is upheld, that the State would realize a revenue almost equal to the deficit.

At the present time there is no way of paying off this deficiency except by a bond issue, which would first have to be authorized by the State Legislature, and a vote of the people, as provided for under Section XXV, Art. X, State Constitution. This should not be made until our Gross Revenue Tax Law has been passed upon by the court of last resort, as there would be no way of estimating the amount of bond issue needed.

You will readily see that the financial condition of the State depends very largely upon an immediate determination by the court of the Gross Revenue case, *Meyer, vs. Wells Fargo Express Co.*

Trusting this is the information you desire, I am,

Yours truly,

**LEO MEYER,**  
*State Auditor.*

Lisman.

EXHIBIT "B."

STATE OF OKLAHOMA.

Office of  
State Auditor.

Oklahoma City, Nov. 4, 1911.

Honorable Charles West, Attorney General,  
Oklahoma, Oklahoma.

Dear Sir:—

Replying to your letter of this date in which you ask if the "deficit in State Funds had any effect upon the value of State Warrants, so as to impede the cashing of the same at par," I beg to say that it has hitherto for some time, been impossible to cash State Warrants at par, but in consequence of the action of the State School Land Board a few days ago requiring State Warrants as security for bank deposits, in their department, many of the banks of the city have announced that they will cash salary warrants at their face value.

This will relieve the situation as regards State Employees, but gives no general relief, and it is freely pre-

dicted in banking circles that the relief as regards salary warrants will only be temporary.

It is our understanding that there are over \$2,500,000 of State Warrants outstanding, issued prior to July 1st, of this year, for which there is no provision for payment, and the influence of this amount against the State's credit is of course demoralizing.

Yours very truly,

J. D. BALLARD,

*Asst. State Auditor.*

BL.

Office Supreme Court,  
FILED.

OCT 11 1911

JAMES H. McKEN

NO. 624

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IN THE  
SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1911

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LEO MEYER, AS AUDITOR OF THE STATE OF  
OKLAHOMA, *Appellant*,  
VS.  
WELLS FARGO & COMPANY, *Appellee*.

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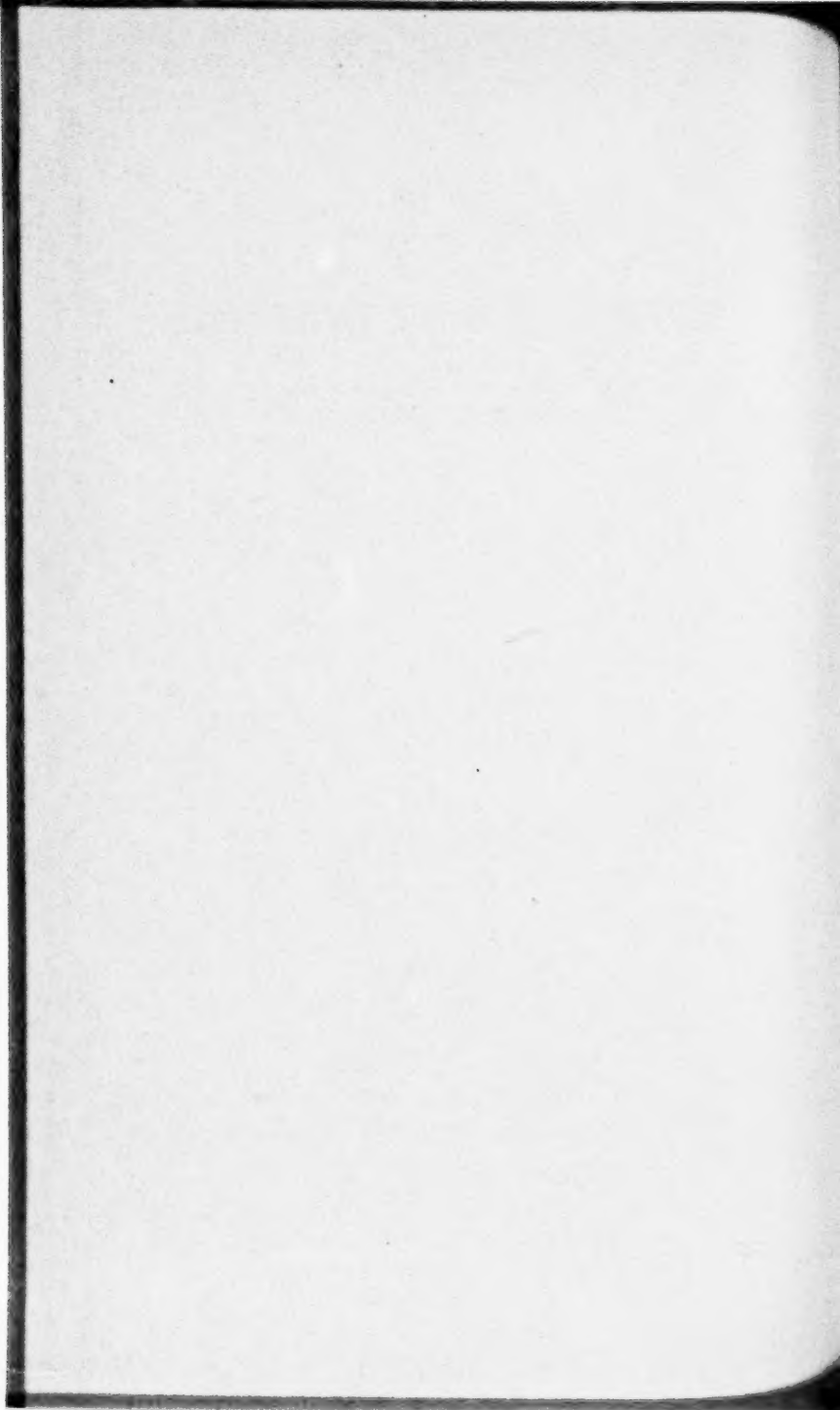
On Appeal from the Circuit Court of the United States  
for the Western District of Oklahoma.

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BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR

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CHAS. WEST,  
*Attorney General of the State of Oklahoma.*  
*Attorney for Appellant.*



NO. 624

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I.

ABSTRACT OF THE CASE.

A. *Questions Raised.*

The only questions involved in the case are as follows:

- (1.) Is the gross revenue tax of the State of Oklahoma, the Act of March 10, 1910, an interference with interstate commerce as far as the defendant in error is concerned?

(2.) Should the said Act be construed to apply to receipts from interstate commerce as well as intrastate commerce?

(3) Whether construed as applying to intrastate or interstate commerce, the portion of the receipts derived from intrastate commerce is separable from that portion derived from interstate commerce. Should there not have been a tender thereof before an injunction against the other portion was granted?

#### *B. How Raised.*

These questions are raised by a bill in equity filed in the Circuit Court of the United States for the Western District of Oklahoma by the plaintiff below, an express company engaged in both interstate and intrastate commerce in the State of Oklahoma, on the 29th day of October, 1910 (pages 1 to 5 of the printed record). To this the defendant below, M. E. Trapp, Auditor of the State of Oklahoma, filed a demurrer (pages 6 to 7 of the printed record). In January, 1911, the original defendant retired from office, his place being taken by the present plaintiff in error, Leo Meyer, who was accordingly substituted as defendant below by agreement of the parties (pages 8 and 9, printed record). The bill was amended accordingly (page 9 of the record). Final Judgment was on the 20th day of March rendered in favor of the plaintiff below, overruling the demurrer of

the defendant below (page 11, printed record). The defendant announced that he would stand upon the demurrer (page 11, printed record), on April 27th filed assignments of error (pages 12 and 13, printed record) and on the same day an application for appeal (pages 13 and 14, printed record). The appeal was duly allowed (page 14 of the record) and a bond given and approved (page 15, printed record). The defendant in error filed a waiver of citation on appeal (page 15 of the record) and stipulated on what the record should contain (page 16 of the record). This record was filed in this court on May 25, 1911.

## II.

### SPECIFICATIONS OF ERROR.

The assignment of error specified:

(1). That the court committed error in overruling the demurrer of the defendant below.

(2). That the court erred in rendering judgment against the defendant below restraining him from enforcing Chapter 44 of the Session Laws of the State of Oklahoma, 1910, being an act approved March 12, 1910, entitled "An Act Providing for the Levy and Collection of a Gross Revenue Tax Upon Public Service Corporations," etc.

If the Act is construed as applicable to both intrastate and interstate business, but notwithstanding this is construed as constitutional, and as not an interference with interstate commerce, the order overruling the demurrer as well as the order permanently enjoining the defendant from enforcing the Act are necessarily erroneous. The Act, however, can be construed as applicable only to intrastate commerce and as so construed the receipts derived from such commerce are clearly separable from those derived from interstate commerce, because each

item of business is separate. If construed to apply to intrastate commerce alone, beyond the doubt of anyone the Act would then be constitutional. For this reason a tender of the taxes due under the Act so construed which were necessarily payable should have been made before institution of the suit, and for want of the tender being pleaded and proved, the demurrer necessarily should be sustained, and the order enjoining the enforcement of the law was necessarily erroneous.

## ARGUMENT.

This action was brought in the Circuit Court for the Western District of Oklahoma to restrain the defendant below as State Auditor from issuing certificate to the sheriff of the various counties of that State, showing the amount of tax to be by them levied against the property of and collected from the plaintiff below, Wells Fargo & Co., pursuant to Section 9 of Chapter 44 of the Session Laws of 1910 of that State, being "AN ACT providing for the levy and collection of a gross revenue tax from public service corporations," etc.

The act of which Section 9 forms a part is one of a system or scheme of taxation adopted at the same time by the State Legislature. This act is in *pari materia* with other acts. This is of supreme importance as indicating whether it is a tax on the receipts of interstate business, or a tax on the property used in both interstate and intrastate business; and thus, but a measure of the value of that property so used. The parties are in thorough dissonance on this question. The company contending that the tax is an interference with interstate commerce, the State contending that the tax is no more such interference than would an ordinary ad valorem tax be so.

Further, the State urges that if the act be construed as a tax upon receipts, and not a measure of the value of the property together with the franchise or occupation based upon its earnings, in such case the act is capable of being applied to intrastate earnings alone. As to such it would be constitutional even upon the theories applied to it by the company. If as applied to both interstate and intrastate earnings it is unconstitutional, it will be interpreted as including intrastate earnings only, and, because there has been no tender of the taxes due upon the indisputable intrastate earnings, the bill does not state an action in equity and should be dismissed for want of such allegation of tender.

These propositions—the susceptibility of the language used to a construction covering intrastate commerce only; the duty of the court to so construe it, if otherwise construed it be an interference with interstate commerce; the necessity of tender and allegation thereof covering all intrastate receipts; allegations that there were no intrastate receipts; the fatal insufficiency of a bill lacking such necessary tender to vest jurisdiction—stand undenied, undisputed, and apparently indisputable. They are decisive of the case.

But because a construction that the act applies only to intrastate commerce to avoid a holding that it is unconstitutional, amounts to a holding that construed as in-

cluding interstate commerce it would infringe the commerce clause of the federal constitution, before remanding the case below with directions to dismiss it; first, the act should be examined to determine whether it is constitutional if containing a tax upon property measured by interstate as well as intrastate receipts.

The strongest argument that can be made against the act is derived from the close similarity of a part only of the Oklahoma law to the statute of Texas held invalid by this court in *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217; 52 L. Ed. 1031.

But the patent answer to this argument is that it is only as to a part where the similarity exists and that the decision in the Texas case was because of the absence from those laws of the very things present in the Oklahoma law, to-wit: that the Texas gross revenue law was not in lieu or place of any other tax, whereas the Oklahoma gross revenue law is only instead of the corporation franchise tax levied in Oklahoma on all corporations not paying a gross revenue tax, but upon none of those paying such tax.

The entire statutes to be considered are as follows:

FIRST: *The Gross Revenue Tax.*

Chapter 44, Session Laws of Oklahoma, 1910, p. 65, *et seq.*, has twelve sections. It is entitled:

"AN ACT providing for the levy and collection of a gross revenue tax from public service corporations in this State and from persons, firms, corporations or associations engaged in the mining or production of coal, asphalt or ores bearing lead, zinc, jack, gold, silver or copper, or of petroleum or other mineral oil or of natural gas; and declaring an emergency."

The first section provided that the

"term 'transportation company' shall exclude railroad companies operating steam railroads in the State, but shall include any freight car company, car corporations or company, trustee, or person engaged in the business of renting, leasing or hiring private cars for the transportation of persons or property and shall include any person, firm or association, company or corporation engaged in the express business."

Further said section defined "transmission company" and "public service corporation company," so that the second term includes "all transportation (just defined) and transmission companies, all gas, electric light, heat and power companies, all waterworks companies," etc.

The second section then provided:

"Every corporation hereinafter named shall pay the State a gross revenue tax for the fiscal year ending June thirtieth, nineteen hundred and nine, and for each fiscal year thereafter, which shall be in addition to the taxes levied and collected upon an *ad valorem* basis upon the property and assets of such corporation equal to the per

centum of its gross receipts hereinafter provided, if such public service corporation operate wholly within the State, and if such public service corporations operate partly within and partly (sic, for partly) without the State, it shall pay tax equal to such proportion of said per centum of its gross receipts as the portion of its business done within the State bears to the whole of its business; provided that if satisfactory evidence is submitted to the Corporation Commission at any time prior to the time fixed by this act for the payment of said tax, that any other proportion more fairly represents the proportion which the gross receipts as the proportion upon which said tax for any year within this State bears to its total gross receipts, it shall be the duty of said Corporation Commission to fix, by an order entered of record, such other proportion of its total gross receipts as the proportion upon which said tax shall be computed; and a copy of such order so made and entered of record, as aforesaid, shall be certified to the Auditor."

Section 3 follows thus:

"Such gross revenue tax so required to be paid shall be equal to the percentage of the gross receipts of each public service corporation as follows: Sleeping car companies, stock car companies, refrigerator car companies and other private car associations, car trusts and car companies, any person, firm, association, company or corporation engaged in the express business, three per centum; pipe lines, two per centum; telephone companies, one-half of one per centum; telegraph companies, two per centum; electric light and gas, heat and power companies, one-half of one per centum; waterworks companies, one-fourth of one per centum. For the purpose of determining the

amount of such tax, the managing officers or agents of each of such public service corporation shall, on or before the first day of October, nineteen hundred eight and annually thereafter, report to the State Auditor under oath, the gross receipts of such public service corporation, from every source whatsoever, for the fiscal year ending the thirtieth of June, and shall immediately pay to the State Treasurer the gross revenue tax herein imposed, calculated as hereinbefore provided," etc.

Then follows provision for the acquisition of such additional information as the Auditor deems necessary.

The fourth section commands the Auditor to compute the tax if the company fails to report it.

The fifth section fixes the date of delinquency of the tax.

The sixth, seventh and eighth sections provide for a property tax on petroleum and other mining products estimated upon their output.

Section nine provides for the issue by the Auditor of his warrant to the various county sheriffs for taxes delinquent under the act, and for the levy under such warrant.

Section eleven declares a false oath under this act perjury.

Section twelve provides that taxes paid under the

act shall be applied to the ordinary expenses of the State government.

Sections one and two above only can be compared with the Texas act.

It will be noted first that Chapter 44 is not applicable to railways, whereas the Texas act is so. The nature of the lines of business which pay a gross revenue and gross production tax should be noticed. They are such as express, wire, gas and pipe line companies operating for hire, and mining companies whose output is so unstable in value and output, paying the equivalent of a receipts tax, a production tax.

Mr. Justice Lamar, speaking for this court in the *Pacific Express Company v. Seibert*, 142 U. S. 354, pointed out how little property express companies had to be measured as is the property of others. It must be conceded that those lines of business placed under this Oklahoma act are grouped according to reason, graduated upon the relative receipts of such business compared to the investments necessary to carry them on.

SECOND: *Railway Excise Tax.*

But railways who must furnish a valuable plant to transact the business are not included in the act. For them the same session of the Oklahoma Legislature provided in Chapter 45, pp. 70 to 77, a different measure

based on somewhat the same idea. It should be examined as in *pari materia* with Chapter 44, and affording a clue to the meaning of Chapter 44.

Chapter 45 is entitled:

"AN ACT to provide for the taxation of the property, franchises and business of railroad companies for State and municipal purposes."

Section one is of definitions, but the act is to apply only to railways operating for hire.

It is provided in section two:

"Every railroad company, according to its classification as hereinafter provided, shall, on or before the thirtieth day of November, of each year, after the passage of this act, pay a tax upon the value of its property and franchise in this State, and upon its business done therein. The value of its property and franchise in this State, and of its business done therein shall be ascertained from its average gross receipts per mile upon the whole number of miles operated, and its average gross operating expenses per mile for the whole number of miles operated, as provided in this act."

In following sections, three to seven, a complicated system of tax measurement is provided. It is only pertinent to point out that "*the valuation is ascertained by dividing its total receipts for said fiscal year by the total number of miles of main track operated,*" etc. (Section 4 as well as 2.)

Under Section 8, a tax graduated for different classes is made payable "for the ordinary expenses of State government," and this particular tax is declared to be "in lieu of all other taxes *for State purposes.*"

Under Section 9 a tax graduated for different classes, but in other and different per cents than the tax under Section 8, is made payable for the purposes of county, city, town, township and school district through or into which such railway operates in a figure of the percents therein named for each mill levied upon property taxed upon an *ad valorem* basis for such municipality.

Under Section 10 side tracks, depots, station houses, machine shops, or other buildings are to be taxed *ad valorem*. And after various minor provisions as to reports, delinquency, etc., it is provided in Section 19 that the act shall not apply to railways not operated for hire which are to be assessed *ad valorem*.

Plainly this tax is not in lieu of *ad valorem* taxation for county, city, town, township and school district purposes. It is an occupation tax fixed as the privilege of conducting transportation by rail for hire, for the privilege of taking tolls. (*Morgan v. Louisiana*, 93 U. S. 217). It is to be added to the *ad valorem* tax just as the gross revenue taxes on express companies and production tax on mining is in addition to the *ad valorem* tax.

Further, from the words of the act it appears that these taxes which are on property whose valuation is ascertained by reference to its gross receipts, are not in lieu of all other taxes, for the limiting words contained in Section 8 are specifically said of *State taxes only*. In fact, the words "in lieu of all other taxes for State purposes," means only all other taxes of that genus, "specific" taxes. Because the income, gross revenue, gross production, corporation franchise, graduated land tax and inheritance taxes, are for State purposes solely as distinguished from all purposes and this railroad tax belongs to the same genus, and also because under the constitution of the State, Sec. 21 of Art. X, the State Board of Equalization, "shall assess all railroad and public service corporation property." "Assess" here means value for taxation. And Section 8 of Article X of that constitution provided that "all property which may be taxed *ad valorem* shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

### THIRD: *Corporation Franchise Tax.*

This becomes the more plain when the other taxes are considered. Let us examine the corporation tax law. It was enacted by the same legislature, and therefore peculiarly in *pari materia*. (Chapter 57 of the Session Laws of 1910, p. 99, et seq.) Mark these provisions:

"Section 1. No corporation heretofore or hereafter incorporated under the laws of this State, or of any other State, shall do or attempt to do business by virtue of its charter or certificate of incorporation in this State without a State license therefor; *provided, however, that the provisions of this act shall not apply to railroad companies, car companies, electric railroad companies, telephone and telegraph companies, heat, light and power companies, waterworks and water power companies, insurance companies, banking or trust companies, building and loan associations; or to any company or corporation not organized for profit.*"

"Section 2. It shall be the duty of every corporation incorporated under the laws of this State, and of every foreign corporation now doing business, or which shall hereafter engage in business in this State, to procure annually from the corporation commission a license authorizing the transaction of such business in this State.

"Each domestic corporation shall pay a license fee of fifty cents for each one thousand dollars of its authorized capital stock or less, and each foreign corporation shall pay a license fee of one dollar for each one thousand dollars of its capital stock employed in its business done in this State; *provided that the license fees provided in this act shall not be required on that portion of its capital stock employed by any corporation in any business upon which a production, income or gross receipt tax is required to be paid under the laws of this State,*" etc.

It must be borne in mind that this difference herein declared as to foreign and domestic companies only ap-

plies to corporations entering the State after the passage of the act. As to those entering previously they are as if domestic corporations by the provisions of Section 1538, *et seq.* of Compiled Laws of Oklahoma, 1909, Snyder, providing for entrance by foreign corporations into the State to do business, and Section 555 of same, fixing a domestic domicile to every corporation doing business in the State.

#### FOURTH: *The Income Tax.*

Article XVI, Chapter 98, Compiled Laws of Oklahoma, 1909, Snyder, Section 7743, *et seq.* provide for a *graduated* tax upon the excess of all yearly incomes over \$3,500. But notice:

“Section 7747. the above tax shall not be levied upon the income derived from property upon which a gross receipt or excise tax has been paid.”

#### FIFTH: *The Tax on Gifts and Inheritances.*

Article XIV, Chapter 98, of Snyder's Compiled Statutes, Section 7712, provides for a graduated tax on all gifts in contemplation of death, and inheritances above the certain amounts named in Section 7715.

#### SIXTH: *A Graduated Land Tax.*

Section 7738, *et seq.* of Snyder provide a tax against all persons owning land in the State of taxable value greater than 640 acres of average taxable value.

But notice Section 7741 exempting corporations from its effect as to all lands which they are authorized to own.

It will be noted that all those corporations organized for profit exempted from the corporation annual license tax, (Chapter 57, Session Laws of 1910, p. 99), pay an excise tax not paid by the corporations which pay the annual license tax, or else are assessed in some other than the usual *ad valorem* method.

The railroad pays the excise tax of Chapter 45, Session Laws of 1910, p. 70; the public service corporation and the mining company pay the gross revenue or the production tax (Chap. 44, Session Laws of 1910, p. 65); insurance companies the special tax on premiums provided by Section 3742, Snyder; banks, state and national, trust companies and corporations doing business for profit other than those in which by the law of 1909 paid a gross revenue tax, are to be assessed not on the value of their property, but the net value of their capital, surplus and undivided profits; building and loan companies shares and their notes and mortgages were exempted from taxation by sub-section 17 of Section 7542, Snyder, because, probably, of their purely mutual character and that the land is otherwise taxed.

Behind all of these special methods of reaching property value for taxation lies the general *ad valorem* tax.

Section 7541, Snyder, provides that all property not exempt shall be subject to taxation. Section 7542 specifies the exemption. Section 7547 provides that all taxable property, real and personal, shall be listed and assessed each year at its fair cash value, estimated at the price it would bring at a fair voluntary sale.

Then follow provisions by which property of all public service corporations is assessed *ad valorem* by the State Board of Equalization, (Secs. 7584-7585 and 7596) and all other personal and real property is likewise assessed *ad valorem* by the local assessor. (Arts. II and III, Chap. 98, Compiled Laws of 1909, Snyder). Each is commanded to estimate all property at the value it would bring at a fair voluntary sale for cash.

*The Oklahoma Tax System* appears, thus, though somewhat complex to be at least harmonious, symmetrical and not unjust.

All taxable property is to be assessed at its fair cash value. (Snyder, Sec. 7547).

But public service companies, because, largely, they do an interstate, or at least inter-county business in various tax districts, necessitate a valuation as a unit with an equitable division of the aggregate assessment between contending taxing districts. Therefore these are valued by the State Board and the value distributed by the Auditor. (Snyder, Art. IV, Chap. 98).

But corporations not under public control, not public service corporations, operated for profit exhibit such a diversified set of conditions as to render their valuation, if by the State Board, too large a task. Such companies show generally, one ground of fair comparison. Their pathway to success is by increasing the net value of their capital, surplus and undivided profits. This, consequently, is the method selected for their valuation. (Sec. 7558, Snyder). Notice as we go how Section 7558 purposes to arrive at the very value. "Moneyed capital" as used in this section shall include money actually invested in the business of such corporation whether represented by certificates of stock, debentures, or bonds."

All other property, not money capital corporations, or public service corporations, are to be assessed by the local assessors, subject to equalization and correcting as to any county or class by the State Board. (Snyder, Sec. 7620).

But it is notorious that this general property tax tried out unsuccessfully in all the other states, and while a pretty theory is, in practice, very deficient in obtaining an equal taxation on all property and property returns.

Now the legislature is not limited to the general property tax.

It was provided, Section 12, Article X of the Constitution :

"The legislature shall have power to provide for the levy and collection of license, franchise, gross revenue, excise, income, collateral, and direct inheritance, legacy, and succession taxes; also graduated income taxes, graduated collateral and direct inheritance taxes, graduated legacy and succession taxes; also stamp, registration, production or other specific taxes."

And Section 22:

"Nothing in this constitution shall be held, or construed, to prevent the classification of property for purposes of taxation; and the valuation of different classes by different means or methods."

From the latter it would appear that all taxation is to be upon property, and that classification thereof must be but a method or means of reaching value.

The light shed by this fundament must color the meaning of all taxation provisions.

Except as means of valuing property, no power of classification exists.

But we find the first State Legislature dissatisfied with the general property *ad alore*m tax.

Realizing that a vast amount of property dodges taxation *ad valorem*, it was devised that there be:

1. For individuals, an income tax. (Snyder, Sections 7743, *et seq.* enacted 1907-8).

2. (a) For public service corporations (including railroads, Sec. 7703, Snyder) a gross revenue tax.

(b) For mining enterprises, a production tax. Sessions Laws 1907-8, p. 640.

3. For omitted property, a tax ferret. Session Laws 1907-8, p. 729

But it was provided that there should be no tax upon income received from a corporation having paid a gross revenue tax.

When read in the light of Section 22 of Article X of the Constitution, the fact that the income tax is upon the individual and the gross revenue tax on the corporations, (but no tax on an income derived from the class subject to the gross revenue tax), seems to show very plainly that all these taxes are but attempts to reach values otherwise omitted under the *ad valorem* tax.

An indication of this is the placing of the gross revenue tax only on those corporations which filling public functions, performing some one or more of the duties the government owes its citizens, are protected in the guaranty of a reasonable return on their property.

The corporations not guaranteed a reasonable return from its prudent investment and operation is not taxed according to gross receipts.

Is this not a valuation of the property right therein contained?

Similarly mining, because originally all minerals belong to the King, is a privilege and thus rightfully supports a production tax on the value of the property not thus given by law, and also because the mineral hidden in the earth forbids a just estimate of its value except as it is mined.

But the next legislature proceeded further to tax the property right in the individual of taking an inheritance or gift made in contemplation of death. (Snyder, Section 7712, *et seq.*) This was property which usually passed by unobserved, unassessed.

It also proceeded to tax the right assured by law in the individual to own land by placing a graduated land tax on the value of this property right. (Snyder, Section 7738, *et seq.*)

This legislature conceived that the net value of the capital, surplus and undivided profits of "moneyed capital" corporations would more nearly reach the true selling value of their property than the opinion of the local assessor formed from reading the companies returns, (Snyder, Section 7567) therefore the moneyed capital valuation act for companies other than assessed by the State Board was proposed and passed by this legislature. (Snyder, Section 7558).

But while the individual paid his *ad valorem tax*, his income tax, his graduated land tax, his inheritance tax; the public service corporation its gross revenue tax; the mining venture its production tax; the insurance company the tax on its premiums; the bank and trust company the novel burden of the guaranty of deposits; the ordinary industrial, commercial and business doing corporation continued to elude taxation by the very complexity, privacy and size of its business.

This led to a rearrangement of taxing methods in 1910. In that year the annual license tax on all corporations, both domestic and foreign, is devised, for all companies not covered by the special valuation devices just named. (Chapter 57, Session Laws of 1910, p. 99).

It will be discovered that this license tax is also but a plan to reach the valuation of the property by measuring it in proportion to its authorized capital, if domestic, or that proportion of the capital employed in the business done in the State, if foreign. (Note that foreign companies already doing business here are regarded as domestic. Snyder, Sec. 555).

It is patent, also, that this tax, as all the others, is to be regarded merely as an effort to reach the value of the property.

Not only does Section 1 specifically exclude from the terms of the act all public service, insurance, banking,

building and loan companies, which are precisely those for whom other methods of reaching valuation are provided, but section two again provides:

“That the license fees provided for in this act shall not be required on that portion of its capital stock employed by any corporation in any business upon which a production income or gross receipts tax is required to be paid under the laws of this State; but any corporation claiming exemption from the payment of the license fees on any portion of its authorized capital shall in addition to all other statements required by the provisions of this act, file a statement under oath of its president, secretary or other managing officer, showing in detail the different kinds of business in which it is engaged, and the kinds of business in which it is engaged, and the portion of its capital employed in that part of its business upon which a production income or gross receipts tax is required to be paid under the laws of this State.”

Further, for the purpose of determining the tax the domestic company states the amount of stock for each holder with his address. But the foreign company not only must state this, but also “the value of property owned and used by the company in the State of Oklahoma and where situate, and the value of property owned and used outside of the State of Oklahoma; the proportion of the capital stock of the company which is represented by property owned and used and by business transacted in this State.”

*“Business transacted in this State”* evidently refers

to and means the business measured in dollars and cents, that is the gross receipts of it.

Thus, it appears, that not only is this a method of valuing property, but a method whose measure is a part of the gross receipts.

And this measure is in lieu of the gross receipts method adopted for public service companies.

To complete its scheme the legislature, because, probably, railroads provide a more extensive more tangible transportation plant than do other public service companies, adopted the plan of a separate scheme of valuation according to the measure of receipts for railroads, Chapter 45, Session Laws of 1910, p. 70, and substantially readopted for other public service companies the gross revenue law of 1909 appearing in Chapter 44 of the Session Laws of 1910, p. 65.

That Chapters 45 and 57 of the Session Laws of 1910 are plainly laws taxing property in terms of gross receipts on capital is too plain.

The synchronous passage of Chapters 44, 45 and 57 ought naturally to unfold a similar intent. The same rather than a different purpose is to be presumed, especially when if the intent to value property measured by receipts be lawful and any other purpose be unlawful.

Further, not only are Chapters 44, 45 and 57 of Session Laws of 1910 approved March 10, March 10, and March 15, 1910, respectively, but there is the strongest internal evidence of identical authorship.

Note that the title of 44 contains the statement that an emergency is declared, (under Section 58, Article V, Constitution, to have immediate effect), yet the act contains no such declaration. However, Chapter 45 contains a section declaring an emergency (Section 20), yet its title contains no mention of it. As if these titles and acts were confusing the writer of them.

Further, the forms of Chapters 44 and 45 are so closely alike that though it is possible there was a different authorship, separate drafting is well nigh impossible. Each starts with a section on definition. This section is useless. It is covered by Section 34, Article IX of the Constitution. But the draftsman of these acts had an inexact knowledge of that which weighed heavily on his mind until released by the first section. Then in each case follows in the same order, basis of valuation, required return, what shall be if corporation fail to report, delinquent tax collection of defaulting payment by Auditor's warrant, provision as to perjury. Nor does Chapter 57 leave the beaten pathway very far at any time.

Again, a student of law will note that Section 1 of Chapter 44 by exclusion of railroads refers to Chapter 45

doing in the preparation of Chapters 45 and 57, passed at the same time for the same general purpose.

Further, the provision of Section one, being that if a public service corporation operate partly beyond the State it shall pay a tax equal to such a part of the whole receipts as the business done within the State bears to the whole business, but if satisfactory evidence is presented of a fairer method of division, the commission is to follow that fairer measurement. This is strong evidence that the receipts are regarded as but measurements of value. Because the commission would be authorized to divide the gross receipts not only according to the collections within the State; but if it saw fit it might rest the division upon proportion of investment, or proportion of tonnage, or track mileage, or bonded indebtedness, or proportion of expenses; something not receipts at all. And thus the ultimate measure of tax be not receipts.

If the thing which determines the tax be or may be not commerce, not transported articles, not transportation, but the tolls, the expense, the length of transportation, how can it be said the tax is on commerce or infringes upon the exclusive control of Congress over interstate trade?

Thus, upon a close analysis, the Oklahoma Act bears but a superficial resemblance to its Texas predecessor.

If this court considered the power of the Comptroller under Section one of that act to lay the measure of the re-

ceipts not according to the commerce but the investment, the expenses, etc., it did not indicate that consideration in the opinion.

In any event, the first words of Section 1 of the Texas Act provided "an annual tax \* \* \* equal to one per centum of its gross receipts." The Oklahoma Act, however, should be construed to read "a gross revenue tax, for the fiscal year \* \* \* *upon the property and assets of such corporation*, in addition to the taxes levied and collected upon an *ad valorem* basis, equal to the per centum of its gross receipts."

It can be so construed. Such a construction is to place it in harmony with the simultaneous legislative provisions, and with the general scheme of taxation. A construction in conflict with the federal constitution will not be adopted if any other construction is possible.

Butler v. Penn., 10 How. 415;

Mayor v. Cooper, 6 Wall. 251.

The Oklahoma tax being so plainly in lieu of the railway tax, (Chapter 45, Session Laws 1910), of the income tax on individuals, of the corporation franchise tax (Chapter 57, Session Laws of 1910), the discussion by Mr. Justice Peckham in *McHenry v. Alford*, 168 U. S. 652, at p. 670, is very persuasive of the validity of this act:

“But there is great force in the claim that the act is not subject to the objections mentioned in the above cases reported in 121 and 122 U. S. and the cases therein referred to. In those cases there was a distinct tax upon the gross earnings without reference to any other tax and not in substitution or in lieu of another tax, while in this case the act plainly substitutes a different method of taxation upon the property of a railroad company. It is a tax upon the lands and all the other property of the company, but instead of placing a valuation upon the lands and other property, and apportioning a certain amount upon such valuation directly, as was the old method, a new one is established of taking a percentage upon the gross earnings as a fair substitute for the former taxes upon all the lands and property of the company, and when it is said, as it is in this act, that the tax levied under such circumstances and by such methods was not in reality a tax upon the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross receipts.”

The United States bears the same relation to intrastate commerce as the States to interstate commerce. Each is supreme within its own authority. The authority of each within its proper sphere is exclusive of the other.

Yet in *Flint v. Stone Co.*, 220 U. S. 107, an occupation tax upon the franchise granted by States to corporations calculated by the income received from every source, though it include receipts from purely intrastate commerce, was sustained. And further, it was said, p. 354, that such hold-

ing was not in conflict with *Galveston, H. & S. A. R. Co., v. Texas*.

The distinction was made that the federal tax was purely a franchise and excise tax on doing business under the corporate form. But the Texas tax was held to be in substance and intent a taxation of interstate commerce as such.

The rule is, thus, at length, plain, that if the substance and intent be to tax interstate commerce, such act would be void, but a plain tax on public service property as a condition of taking tolls from the public for the service in lieu of other excise franchise, income tax, will not be held an interference with interstate commerce, though the measure be laid on all commerce done by the company.

The substantial effect and intent and whether in lieu of an excise tax, is the basis upon which all the decisions harmonize.

In the case of *State Freight Tax*, 82 U. S. 15 Wall 232, the tax was upon the tonnage of freight. It was said that the carrier was but the instrument through whom a collection was levied upon the transporter. The tax was held not to be a franchise tax, nor tax on property or business, but on freight carried. The tax was void.

In *State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall 326, the tax was as the Oklahoma tax in addition

to the ordinary general property tax, and as the Oklahoma tax, laid on companies subject to pay an income tax. The tax was held to be franchise tax, not a tax on transportation or the transporter. The tax was valid.

In *Osborne v. Mayor*, 83 U. S. 16 Wall 479, there was provided license fees to allow an express company to do business in Mobile, intrastate business in Alabama, and to make contracts in Alabama for delivery of freight without the State. Any interference with interstate commerce was found subsidiary. The tax was valid.

In *Moran v. New Orleans*, 112 U. S. 69, a privilege tax to run tow boats from New Orleans to the Gulf was found to be not levied for doing business at the situs of the tax, but to be an interference with interstate commerce. The tax was void.

In *Delaware State Tax Cases*, 85 U. S. 18 Wall. 206, a 3 per cent annual tax on the net receipts of companies doing interstate business was levied. It was said that a franchise tax may be graduated according to business or income.

The tax was in addition to one of one-quarter of one per cent on the capital stock as the Oklahoma tax is in addition to the *ad valorem* tax. The tax was valid.

But in *Pickard v. Pullman Car Co.*, 117 U. S. 534, cars all of which did interstate business, were taxed per car when used in transportation. It was not an attempt to

value the property or the business in proportion to the cars used. The tax was found to be a direct interference with interstate commerce and void.

In *Erie Co. v. Pa.* 88 U. S. 21 Wall. 492, the company paid annually \$10,000 and also paid on a proper portion of its capital to represent the construction in Pennsylvania. An act provided an additional tax of  $\frac{3}{4}$  of 1 per cent on its gross receipts, divided according to mileage. The parties conceded the validity of such a tax if the company could be held to be doing business in Pennsylvania by passing through that State for forty-two miles. Both the court and counsel assumed that the tax was a franchise tax. The tax was sustained.

*Wiggins Ferry Co. v. East St. L.*, 107 U. S. 365, is a case similar to *Osborne v. Mayor*. A license tax was levied by the tax district in which ferry boats had a situs which transferred passengers and freight across the Mississippi. It was sustained as a franchise tax.

In *Fargo v. Michigan*, 121 U. S. 230, a tax of  $2\frac{1}{2}$  per cent of gross receipts of interstate commerce was laid. The company did no business in the State and was totally foreign to it. Was exercising no franchise in Michigan, and the tax was not in lieu of an occupation or income tax. (*McHenry v. Alford*, 168 U. S. 670). This company was not even acknowledged as a corporation in Michigan. Tax held

to be a direct interference with interstate commerce and void.

In *Phila. S. Co. v. Pa.*, 122 U. S. 326, there was a tax directly on receipts of a company doing international and interstate business only. It was not in lieu of any other tax. (*McHenry v. Alford*, 168 U. S. 670), and was specifically held not to be a franchise or income tax. This court refused to say, as unnecessary, what would be the result if it were an income tax. It was held that interstate and international trade were taxed directly, and the tax was void.

In *Leloup v. Mobile*, 127 U. S. 640, a franchise tax on a telegraph company to do business in the State was held void because the Act of Congress of 1866 gave this franchise. The case of *Osborne v. Mobile* was mentioned, and it was said that a different decision would be given if the matter were then before the court. It was also said without any limitation or qualification that a State cannot tax interstate transportation, or its receipts or its business. But in view of *Flint v. Stone, et al.*, and *Gibbons v. Ogden*, 9 Wheat. 194, it must now be said that the language of this case is too broad.

In *McCall v. California*, 136 U. S. 104, there was no question of a franchise. It was a case of an individual soliciting interstate commerce. The license fee was held void.

In *Norfolk & W. v. Pa.*, 136 U. S. 114, the company did no business intrastate in Pennsylvania, but solicited interstate commerce there, maintaining an office solely for that purpose. It was held that a license fee for maintaining the office could not be charged.

From this point on the decisions, while not specifically mentioning *Leloup v. Mobile* to overrule it, begin to cut down its dictum.

*Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, held that the law said the tax was a franchise tax though it was measured by the receipts and as such it was upheld. The tax was not intended as one on interstate commerce.

In *Ficklin v. Tax District*, 145 U. S. 1, an occupation tax was sustained though required of one doing a general business, a part of it interstate, and the amount was graduated by income derived from all sources. The tax was found not to be intended as an interference with commerce, but a license.

In *Postal Co. v. Adams*, 155 U. S. 687, a franchise tax was graduated on receipts, including those from interstate commerce. It was found that these but represented the value of the company's property, and this though engaged in both state and interstate commerce. The tax was in lieu of other taxes. The tax was sustained.

In *N. Y. L. E. & W. v. Pa.*, 158 U. S. 431, there was a tax on the tolls paid by a railway to another for the use of its road bed. The commerce paying tolls was engaged in interstate trade and the tolls were paid for the use of road bed for all purposes. But the tax was sustained.

In *McHenry v. Alford*, 168 U. S. 670, as to gross receipts tax in lieu of other taxes, it was pointed out that in the cases where such taxes were held void the taxes could not be held to be franchise taxes.

In *Wisconsin & Michigan Co. v. Powers*, 191 U. S. 378, there was a contract of exemption from taxation unless the gross receipts per mile should equal \$4,000 a mile. Thus the tax was measured by the receipts, yet the law stated, as does the Oklahoma Act, that the tax was "upon the property and business of such railroad company operated within the State," computed upon certain percentages of gross income. Mr. Justice Holmes said this statement was sufficient. This tax was sustained.

In the case of *Galveston, H. & S. R. Co. v. Texas*, Mr. Justice Holmes states, as did Mr. Justice Day, in *Flint v. Stone, et al.*, that it is the reality, the actual result, rather than philosophic notions which must control. That the State must not be allowed to tax interstate commerce directly, yet must be allowed to tax the property as other property. And if the tax amounts to no more than a just equivalent for taxes, it is immaterial by what name it is called.

It is not surprising that the State of Oklahoma, which was allowed to grow as a territory until practically of the population of Kansas, without State institutions, without gradually furnishing its house, should just within the doorway of Statehood find itself face to face with tremendous tax burdens and reach out for large revenue.

But if it tax all alike the express companies cannot complain, because the day of reckoning has come for the tax free period of the past.

These taxes are neither no more nor in principle different from the individuals income tax. They interfere with interstate commerce no more than does that tax. They are exactly of the same nature as the corporation license tax, and the railway tax, both levied upon the value of the company's property measured by its receipts.

The complaint is but the result of a pure accident. The Texas tax of a totally different nature, and substantially different wording only like the wording of this tax in immaterial matters furnishes no guide.

*"Cessante ratione, legis cessat ipsa lex."*

MINING PRODUCTION TAX CONTAINED IN  
GROSS REVENUE ACT OF 1910 ARGUES  
LATTER IS PROPERTY TAX ON  
THEORY OF *EJUSDEM*  
*GENERIS*.

A. INTERNAL EVIDENCE OF SECTION 8.

There is contained in the provisions of Section 8 of the gross revenue tax act of 1910 (as well as its predecessors of Session Laws 1907-8, p. 644, and 1909, p. 624) very strong internal evidence that the mining production tax was regarded by the legislature and meant by them to be a property tax solely.

Said section provides like Compiled Laws of 1909, Snyder, Sec. 7708:

"When satisfactory evidence under oath is produced to the State Auditor that any person, firm, association or corporation engaged in mining or producing within this State asphalt, lead, zinc, jack, gold, silver, copper or petroleum or other mineral oil, have in this State manufactured or refined any portion of such products in this State and thereafter on the finished product have paid ad valorem taxes, the State Auditor is hereby authorized to rebate and pay to such person, firm, association or corporation the just proportion of taxes paid by said person, firm, association or cor-

poration, on his or its crude product under section six of this act, which shall have been found to have been turned into finished product as aforesaid, and shall cause such sum, if any, so rebated, to be repaid by warrant drawn on the State Treasurer."

Section Six, (which we shall examine in a few moments) is the section levying a tax on mineral production.

The rebate here provided for is plainly but an attempt to avoid a duplication of taxation on the same property. The careful limitation to production "in this State," which is manufactured or refined "in this State" and pays an ad valorem tax "in this State" can only be in order that the identical property shall not pay taxes in Oklahoma twice. This careful exemption with its obvious purpose is clearly inconsistent with an intention to tax the producing business as considered apart from the value of the same as property.

All of this shows that in this tax the legislature had in mind the provisions of Section 22 of Article X of the Constitution authorizing it to classify property for taxation, and to value different classes of property by different means or methods.

Thus it is clear that the mineral production tax is a property tax.

## B. ARGUMENT TO SAME EFFECT

### *ab inconvenienti.*

A very strong argument *ab inconvenienti* towards construing the mineral production tax as a property tax arises from the notorious facts as to the nature of the mining properties.

Let it be understood as a matter of which the courts will take judicial cognizance taught by geography, and asserted by multitudes of government reports, that the mining lands of Oklahoma were located in the Indian Territory, and the mineral lands were sought to be set apart from allotment by the Indian Treaties, (Atoka Agreement, June 28, 1898, Vol. 30, p. 495 U. S. Stat. at large) to be separately administered by the government for the Indians. The Segregated Coal Lands, containing it was supposed and intended the principal coal deposits, set apart from allotment, worked by lessees from the Indian Nations, under the approval of the federal authorities, is a matter that need but be suggested here to be fully comprehended. Likewise, the mineral oil deposits are principally upon Indian lands administered likewise by the federal authorities.

The lessees of both coal and oil lands in a certain sense are federal instrumentalities. To the extent and no more that Indian traders or lessees of Indian grazing lands are so. The law is settled that the property of such,

though on Indian Reservations, are taxable, provided it is not taxed so as to interfere with the federal purpose they subserve.

Likewise the ores and minerals while in the earth upon Segregated or Indian Lands, are not taxable by the State. But the ores, coal, or oil when severed from the soil is taxable as the property of the non-exempt lessee, citizen of the United States and of his State.

Under these circumstances, especially during the time that the vast majority of the real estate in what was Indian Territory, remains inalienable and non-taxable, is it to be supposed that the State of Oklahoma as a matter of convenience would prefer to place its tax on the privilege of mining or the mined product as property?

If the latter is the method selected, harmony with Section 8 and an effective tax is provided for; but, if the legislature did not mean to levy a property tax but a privilege tax only, then the vast oil industry in Eastern Oklahoma (second in importance and value in the United States, exceeded only by California), as well as the large coal industry is probably to go entirely untaxed. And until the Indian lands are taxable, the cities and Western Oklahoma are to bear the burden of government.

A conclusion so unjust will not be reached. As a property tax the tax measured by output is sound.

In *Forbes v. Gracey*, Fed. Cas. 4924, it was held that ores extracted from mining claims immediately become subject to State taxation, although the legal title to the land is still in the United States, and though the mining is to subserve a federal instrumentality.

The same holding was made when the case went on appeal to the Supreme Court of the United States, where it is reported in 94 U. S. 762.

In *Moore v. Beason*, 51 Pac. 875, the Supreme Court of Wyoming held that cattle and horses belonging to a post and Indian trader kept on an Indian Reservation, are not exempt from State taxation, because of his character as a post and Indian trader. That he was a mere licensee. The case of *State v. Bell*, Phil. N. C. 76 was cited, wherein a merchant licensed by the supervisory agent of the treasury department to trade with the federal army was held to be subject to State taxation, notwithstanding the fact that he in a sense served a federal purpose.

The same thing was held by the Supreme Court of Montana in *Cosier et al. v. McMillan*, 56 Pac. 965, that a post or Indian trader is a mere licensee and not an instrumentality of the government to the extent that taxation of his property is an interference with the federal government.

The same thing was held afterwards by the Supreme Court of Wyoming in *Noble v. Amoretti*, 71 Pac. 879, in which the previous cases are quoted.

The theory as to exemption of federal instrumentalities arose first in the case of *Weston et al. v. City Council of Charleston*, 2 Pet. 449, in which the authorities of the city undertook to impose a tax upon the bonds of the United States held in the hands of one of its creditors. The power to exempt such from taxation was held not to be the result of any explicit provision of the Constitution, but because otherwise the government of the United States would be impeded in its power of borrowing money under the Constitution.

An example of the converse relation between the Union and the States appears in the case of *Snyder v. Bettman*, 190 U. S. 249, in which it was held that Congress had the power to tax a bequest to a municipality in a State and that such taxation would not be interfering with the State instrumentality. This is because the tax is laid upon the property while it is in the hands of the executor before payment and distribution to the legatees.

Likewise in *South Carolina v. United States*, 199 U. S. 437, it is held that if the State of South Carolina went into the business of selling liquor, that the State government and the liquor business were separate activities, and that a revenue tax could be imposed upon the

liquor business without interfering with the power of the State.

Likewise in the *Baltimore Ship Building Company v. Baltimore*, the decision of the Maryland court rendered in 54 Atl. 623 was affirmed. It is reported in 195 U. S. 375, where it was held that the State might tax a dry dock company; although the dry dock is used principally by the United States. And the court, speaking through Mr. Justice Holmes, said: (p. 382).

“But furthermore, it seems to us extravagant to say that an independent private corporation for gain, created by a State, is exempt from State taxation, either in its corporate person, or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time.”

In *Thomson v. Pacific Railway Co.*, 9 Wall. 591, it was held that corporations engaged in the service of the federal government were not exempt from taxation by the State on that account alone. A distinction was made between the fact that they were the means employed by the government while their property, though it was the property of agents employed by the government, was not the government's property. It was said:

“In respect to property, business and persons within their respective limits, the power of taxation of the States remained, and remains entire, notwithstanding the Constitution.”

Lane Co. v. Oregon, 7 Wall. 77, was cited. And it was added:

"It cannot be that a State tax which remotely affects the efficient exercise of a federal power is for that reason alone inhibited by the constitution. To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which federal taxes may be laid. The States are, and they must ever be, co-existent with the national government. Neither may destroy the other."

If this opinion had been rendered after the opinion of this court in *Flint v. Stone Company*, 220 U. S. 120, it might have been pointed out that under a federal occupation income from every source is considered in measuring the tax, and thus any kind of tax or any kind of lease upon a business that should pay that tax would in so far be an interference with the taxing power of the United States.

It was said in the *Thomson* case that an exemption from State taxation, of agencies of the national government depends not on the nature of their agency, but "whether the tax does in truth deprive them of the power to serve the government as they were intended to serve it." The *Union Pacific* was a federal corporation to transport troops, dispatches, mail and munitions; it was granted

land, aid and bonds, and the government through directors took some part in the actual management and administration of the road.

Next, in the case of *Railroad Company v. Peniston*, 18 Wall. 5, it was reiterated that it cannot be that a State tax which remotely affects the efficient exercise of a federal power is for that reason alone inhibited by the constitution, and the distinction was made between a tax on the property of a corporation, and those operations of the company which were to be for the use of the government. Notwithstanding that the railway in that case was a governmental instrumentality, yet it was pointed out that its property was subject to State taxation, provided only that none of the activities of the railway were taxed in which it was designed to serve the government in such a way as to hinder that service.

In view of what is said in both the *Peniston* and *Thomson* case, it must be understood that emphasis is to be made upon the question of whether the hindrance is remote or direct.

This distinction is more clearly pointed out in the earlier case of *First National Bank v. Commonwealth of Kentucky*, 76 U. S. 353 (9 Wall).

In that case it was held that the shares of stock in a national bank are taxable to the stockholders, and, with

reference to *McCulloch v. Maryland*, that the principle of the exemption of federal agencies from State taxation had a limitation growing out of the very principle itself upon which it was founded. In that the exemption was but the outgrowth of necessity; and, therefore, that necessity was to limit its application. This limitation was that the exemption from taxation was one to serve the efficiency of the government, and not for the profit or benefit of private individuals. Shares in a national bank should be taxed; but the bonds owing by the United States, owned by the bank, could not be taxed. In *McCulloch v. Maryland* the tax was laid upon the very issue of paper.

The question of remoteness or directness was next emphasized in *Utah & Navigation Co. v. Fisher*, 116 U. S. 28, in which it was held that a railway to which Congress had granted right-of-way across an Indian Reservation in a territory, was as to its property on such right-of-way taxable under the laws of the territory, and this holding was repeated to the same effect in *M. & P. Co. v. Arizona*, 156 U. S. 347. Yet the very right-of-way across these Reservations was granted by the United States to serve a federal purpose.

*Cherokee Nation v. Southern Kansas Ry. Co.*,  
135 U. S. 641.



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It therefore does not follow that either a tax on a federal instrumentality or other tax which in a remote way interferes with a federal purpose, is void.

In *Western Union Tel. Co. v. Mass.*, 125 U. S. 549, it was held that a telegraph company, granted a franchise under an Act of Congress of 1866, and engaged in interstate business, could be taxed by the State nominally upon the shares of its capital stock, divided in proportion to the length of its lines within the State of Massachusetts, even though these shares of capital stock represented that part employed in interstate business. It was said that this was merely a method of measuring the value of its property; the remote effect that it had upon interstate commerce did not render it void.

In *Ficklin v. Shelby Co.*, 145 U. S. 1, a license to do a general commission business both intra and interstate, though graduated on the profits from both, was held valid, and it was not conceived that this was an interference with interstate commerce sufficiently direct to render the tax void.

In *Reagan v. Merc. Tr. Co.*, 154 U. S. 413, it was said that a railway incorporated by Congress, was as to its intrastate rates and the police laws of a State through which it operated subject to such laws, and this was notwithstanding that such matters might remotely affect interstate commerce.

In *Postal Tel. Co. v. Adams*, 155 U. S. 687, at page 696, it was said:

“But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax imposed on the corporation on account of its property within the State, and may take the form of a tax for the privilege of exercising its franchises within the State.”

In *N. Y. L. E. & W. Co. v. Penn.*, 158 U. S. 431, it was held that a State had power to tax tolls or rentals paid to one road by another for the use of the track for commerce both inter and intrastate.

It was said (p. 437) that the federal power was not inconsistent with the power of the States “to tax the franchises, property or business of its own corporations” engaged in intrastate commerce, “nor with the power to tax foreign corporations on account of their property within the State.”

This case, together with the one immediately preceding, at least made that distinction very clear.

In *Central Pacific v. Cal.*, 162 U. S. 125, it was again pointed out that the property of federal agents might be taxed, and that all privileges received from the taxing State might be considered as a part of its property there located.

In *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, a tax on the property of an interstate bridge which was to some extent affected by the amount of interstate tolls, was held valid.

In *Thomas v. Gay*, 169 U. S. 264, it was held that cattle grazing on lands leased of Indians might be taxed, even though the lease provided that the herders should be Indians, and though it was clear that the purpose of the laws was to lead to the education of the Indians in the ways of the white man. It was held that unless the tax was upon the rent received by the Indians, it was not on the Indians' land, and it was said:

"It is not perceived that local taxation by a state or territory, of property of others than Indians, would be an interference with congressional power."

In *Wagoner, et al. v. Evans, et al.*, 170 U. S. 586, it was held that cattle grazing on leases on Indian Reservations authorized by Congress, yet were taxable.

In *Montana Catholic Mission v. Missoula Co.*, 200 U. S. 1118, it was held that property of a Mission to Indians on a reservation was taxable, though the Mission was solely for the education of the Indians, and was permitted to be where it was by the Government of the United States solely because it assisted in the purposes of the federal government.

These decisions will emphasize the enormous inconveniences of a construction of the mining tax as a privilege rather than a property tax.

From every point of view it is clear that the mining tax should be construed as a property tax.

## WORDING OF PUBLIC SERVICE CORPORATION AND MINING TAX ANALOGOUS.

A comparison of the wording of the mining tax with that of the gross revenue tax levied on public service corporations other than railroads, leads to the conclusion that they both serve the same purpose, that is, both are taxes on property measured by activity.

Section Six of Chapter 44, Session Laws of Oklahoma, 1910, (the mining tax) reads as follows:

Let us put the essential parts parallel:

### MINING TAX.

“Every person, firm, association, or corporation engaged in mining, or production within this State \* \* \* shall file with the Auditor a statement \* \* \* showing the

### PUBLIC SERVICE TAX.

“Every corporation hereinafter named

gross amount thereof produced; the actual cash value thereof \* \* \*

and shall, at the same time pay to the State Treasurer a gross revenue tax, which shall be in addition to the taxes levied and collected upon an ad valorem basis,

upon such mining, oil or gas property, and the appurtenances thereunto belonging,

equal to one-half of one per centum of the gross receipts from the total production," etc.

shall pay the State a gross revenue tax \* \* \* which shall be in addition to the taxes levied and collected upon an ad valorem basis

upon the property and assets of such corporation,

equal to the per centum of its gross receipts herein-after provided," etc.

That these synchronous similar and sequent, statutes should have a different purpose is only open to the vagary not logic of the mind.

Corroborating evidence that the mining tax is upon property only ceasured by activity is found in the last words of Section Six:

"Provided, that any such person, firm, association or corporation shall at the time of making its report to the State Auditor, set out specifically the amount of royalty required to be paid for the benefit of the Indian citizen, Indian tribe, or landlord and in computing said tax shall pay on the actual cash value of the entire gross production less the royalty paid by such person, firm, or corporation."

This evidences, first, that the legislature had in mind the Indian ownership by tribe of the segregated lands, and by allottees of the oil lands; second, that leases on the same were by law of the United States paid in royalty on production; and, third, that such royalty as a part of the federal machinery for supporting and protecting the Indian was exempt from State taxation. Let us also note that royalty is payable in kind, not currency. The meaning, therefore, is plain. It is this: "Subtract from your production, the royalty (payable in kind), exempt from taxation, (as a federal instrumentality), and pay taxes on the balance as property."

TEXAS LAW LACKED ALL ARGUMENTS DRAWN  
FROM MEANING OF THE OKLAHOMA  
TAX SCHEME.

The meaning we thus seek to deduce from the other provisions of the Oklahoma Tax Scheme, all are lacking to the Texas law. (97 S. W. 72). That law did not have incorporated in it the meaning of sections six and eight of the Oklahoma law. Nor the provisions of Chapters 45 and 57 of the Oklahoma Session Laws of 1910. Nor were all these taxes but to balance that of the individual tax scheme provided in Oklahoma by the income, inheritance and graduated land taxes.

The Texas law, then, is but one of the many parts entering into the final product. Its provisions throw no more light upon the totally different final result than the idea of one legislator may be observed in seeking the meaning of the whole law, (U. S. v. Trans-Missouri Assn., 166 U. S. 317, and Standard Oil Opinion, last term) solely as environment.

court will enjoin the void portion it will require a payment of the valid portion.

State Railroad Tax Cases, 92 U. S. 575;  
Albuquerque Bank v. Perea, 147 U. S. 87.

It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found to be due.

State Railroad Tax Cases, 92 U. S. 575 at 616.

In order for the bill to be sufficient it must contain definite allegations as to what are the interstate receipts.

Respectfully submitted,

CHAS. WEST,

*Attorney General of the State of Oklahoma,  
For Leo Meyer, Auditor of the State of Oklahoma.*

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U. S. SUPREME COURT, U. S.  
FILED.

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JAMES H. McKENNEY,  
CLERK.

No. 624.

In the

# Supreme Court of the United States

October Term, 1911.

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LEO MEYER, AS AUDITOR OF THE STATE OF OKLAHOMA,  
*Appellant,*

VS.

WELLS FARGO & COMPANY,  
*Appellee.*

---

**BRIEF FOR APPELLEE.**

---

S. T. BLEDSOE,  
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C. W. STOCKTON,  
*Of Counsel.*

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No. 624.

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## BRIEF FOR APPELLEE.

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### STATEMENT OF NATURE AND RESULT OF CASE.

This is an appeal from a decree of the Circuit Court of the United States for the Western District of Oklahoma, granting a perpetual injunction against Leo Meyer, as Auditor of the State of Oklahoma, enjoining him from enforcing, or attempting to enforce, as against the appellee the provisions of an act of the Legislature of the State of Oklahoma, approved March 12th, 1910, and commonly known as the Gross Revenue Tax Law of the State of Oklahoma.

Appellee here was complainant below, and M. E. Trapp, as Auditor of the State of Oklahoma, was the original defendant at the time of filing the bill, but his term of office having expired and Leo Meyer having been elected his successor, was substituted upon agreement of counsel by order of court as a party defendant and entered his appearance in the cause.

Wells Fargo & Company, appellee here and complainant below, will be referred to in this brief as complainant, and the defendant below and appellant here will be referred to as the defendant. The term "defendant" will be used to describe both Trapp as Auditor of the State of Oklahoma, and his successor, Leo Meyer, as auditor.

The constitutionality of the law involved was assailed by a bill filed by complainant in the Circuit Court of the United States for the Western District of the State of Oklahoma on the 29th day of October, 1910. (Transcript, pp. 1 to 5.) Upon agreement of counsel the hearing on the application for temporary injunction was on the 31st day of October, 1910, submitted to the Honorable Walter H. Sanborn, Circuit Judge, John H. Cotteral and Ralph E. Campbell, District Judges. (R., pp. 7 and 8.) Pursuant to this submission, on the 20th day of March, 1911, a temporary injunction was granted, signed by Judges Sanborn, Cotteral and Campbell. On the same day the defendant elected to stand upon his demurrer to the bill, which had been filed on the 9th day of December, 1910 (R., pp. 10 and 11), and thereupon a final decree was entered in the cause, making the injunction theretofore granted perpetual, and decreeing the Act involved illegal and void as against the complainant. (R., p. 11.)

From this decree the defendant prosecuted an appeal to this Court.

The complainant is a corporation engaged in the express business on various railway lines throughout the United States, doing in the several states both state and inter-state business.

It operates over various lines of railway in the State of Oklahoma, the mileage operated aggregating one thousand three hundred twenty-five miles, and it operates said lines transporting goods, wares and merchandise between places in the State of Oklahoma and between places outside of the State of Oklahoma and between places within the State of Oklahoma and between places outside the State of Oklahoma, which cross the State of Oklahoma. This transportation is conducted under contracts with various railway companies, by the terms of which the complainant pays to such railway companies substantially fifty-four per cent of the gross earnings from the express business for the services of such railway companies in the transportation of the property, the transportation of which is conducted by the complainant on the trains of such companies.

It is further alleged in the bill that, "The complainant belongs to that class of public service corporations described in Section Two of said Gross Revenue Tax Act, which operates partly within and partly without the state, and that a part of its earnings and receipts within the state are from intra-state business and a part thereof, both receipts and earnings, are from its interstate business."

It is also alleged in the bill that the effect of said law is "To levy a three (3) per cent tax upon a certain percentage of its entire gross receipts from its entire business, wherever done, and upon its income, however realized, whether from transportation or otherwise." The gross receipts of complainant from express earnings for the fiscal year ending June 30th, 1910, were \$27,303,701.75, and that there was received for said year large sums of money as interest upon bonds held by it, rents on real estate and income from various sources, the property from which said receipts were received being located entirely outside the State of Oklahoma and not used in the transportation business. The intra-state receipts for

the fiscal year ending June 30th, 1909, were \$298,655.00; Oklahoma's pro rate of interstate earnings was \$345,955.00. Complainant kept no record of its receipts within the State of Oklahoma as such, but it is alleged in the bill that the same would not be less than four hundred thousand nor more than six hundred thousand dollars.

It is charged in the bill that, "the result of said Act is to directly impose the burden of the tax levied by the Act upon interstate commerce in violation to [of] the federal Constitution and the laws enacted pursuant thereto." And that the Act is violative of Section Nineteen of Article Ten of the Constitution of the State of Oklahoma.

The defendant is the officer of the State of Oklahoma charged by said Act with the execution of its provisions, and it is alleged that he was about to proceed with the enforcement of same.

To this bill the defendant interposed a general demurrer, which demurrer contained a special statement that the suit was one against the State and for that reason ought not to be maintained.

The substantial matter in controversy is whether the act involved constitutes such an interference with and burden upon interstate commerce as to render it invalid as against the complainant.

The complainant insists, in addition to the contention that the Act is a regulation of and burden upon interstate commerce, that if it is to be interpreted in any wise as contended by the defendant it will operate as a tax upon property located outside of the State of Oklahoma and not subject to taxation therein, and is illegal and void for said reason.

Complainant further insists that if the Act should be held a franchise or privilege tax, requiring the payment of the sums fixed as a condition to the right of the complainant to

engage in interstate commerce in the State of Oklahoma, or operates to impose the payment of the amount fixed for engaging in interstate commerce in the State of Oklahoma, said Act is void because it attempts to control and regulate the rights of the complainant to engage in the business of interstate commerce within the State of Oklahoma.

We will first present our views on the validity of the Act involved without regard to the contentions made in the brief of counsel for defendant. This will be followed by a discussion of the contentions as they appear in the brief for defendant.

**The Oklahoma Gross Revenue Act, Approved March 10, 1910, taxes directly the Receipts from Interstate Commerce as such and is void for that reason.**

The Act here involved is published in the Session Laws of the State of Oklahoma of 1910, beginning at page 65. For convenience of the Court it is also printed as an appendix to this brief. The caption of the Act is as follows:

"An Act providing for the levy and collection of a gross revenue tax from public service corporations in this state and from persons, firms, corporations or associations engaged in the mining or production of coal, asphalt, or ores bearing lead, zinc, jack, gold, silver or copper, or of petroleum or other mineral oil, or of natural gas; and declaring an emergency."

It will be observed that the purpose of the Act, as declared in the title thereto, is "providing" for the levy and collection of a *gross revenue tax* from public service corporations.

Section 2 of the Act provides:

"Every corporation hereinafter named shall pay the state a gross revenue tax for the fiscal year ending June thirtieth, nineteen hundred and nine, and for each fiscal year thereafter, which shall be in addition to the taxes

levied and collected upon an *ad valorem* basis upon the property and assets of such corporation equal to the per centum of its gross receipts hereinafter provided, if such public service corporation operate wholly within the state, and if such public service corporation operate partly within and partly without the state, it shall pay tax equal to such proportion of said per centum of its gross receipts as the portion of its business done within the state bears to the whole of its business; provided, that if satisfactory evidence is submitted to the corporation commission, at any time prior to the time fixed by this Act for the payment of said tax, that any other proportion more fairly represents the proportion which the gross receipts of any such public service corporation for any year within this state bears to its total gross receipts, it shall be the duty of said corporation commission to fix, by an order entered of record, such other proportion of its total gross receipts as the proportion upon which said tax shall be computed; and a copy of such order so made and entered of record, as aforesaid, shall be certified to the State Auditor."

Section 3 of the Act provides as follows:

"Such gross revenue tax so required to be paid shall be equal to the percentage of the gross receipts of each public service corporation as follows: \* \* \* any person, firm, association, company or corporation engaged in the express business, three per centum, \* \* \*."

The managing officer of each corporation is also required by the provisions of this section to annually report to the State Auditor, under oath, *the gross receipts* of such public service corporation from *every source whatsoever*, for the fiscal year ending the 30th day of June, and to immediately pay to the State Treasurer the *gross revenue* tax prescribed.

It will be observed that Section 2 of said Act, when considered in connection with the provisions of Section 3 thereof, levies a tax directly upon a certain part or portion of the *entire gross receipts* of all express companies doing business in the State of Oklahoma, realized from *every source what-*

soever, including receipts from transportation, state and interstate. In other words, the basis of the tax levied is the *total gross receipts* of the company from *all sources whatsoever*.

The only possible controversy that can arise is on what percentage of such gross receipts from all sources, including those from interstate and non-transportation business, the statute requires the complainants to pay a tax. Whether the tax is required to be paid upon such proportion of the total gross receipts as the entire receipts in the State of Oklahoma bear to the total gross receipts, or as the earnings in the State of Oklahoma, state and interstate, bear to the entire gross receipts, or whether such proportion as the intra-state earnings in the State of Oklahoma bear to the total gross receipts, is material only in determining the amount that the State may demand. Regardless of which of these factors may be used, the sum to be used as a *basis of division* is the *total gross receipts from all sources*, and the part so found to be subjected to taxation is *a part of the total gross receipts*, whether divided upon one or the other of the bases suggested. We are of the opinion that the statute contemplated using as one of the factors the total earnings or receipts within the state from whatever source derived, and as the other the total gross receipts of the company from all sources; but, as was above said, this is not material to the controversy, because there is no possible construction of the statute that does not require a division of the system gross receipts and the taking of a portion of the gross receipts thus ascertained as the basis for the taxes.

However, that it is the total gross receipts from both classes of business that is subjected to the tax is clearly evidenced by the provision relating to lines that operate wholly within the state. (Section 2.) If the line operates wholly within the state the tax is a per centum of the gross receipts of such line from all sources, including both state and inter-

state. It is hardly possible that the Legislature would contemplate *taxing the entire gross receipts of a carrier which operates wholly within the state accruing from both state and interstate business, and taxing only the intra-state receipts of a carrier that operates partly within and partly without the state.*

This construction, it seems to us, is rendered imperative by the following provision at the close of Section 2 of said Act, to-wit:

*“Provided that if satisfactory evidence is submitted to the Corporation Commission at any time prior to the time fixed by the Act for the payment of said tax, that any other proportion more fairly represents the gross receipts of any such public service corporation for any year, within this State, bears to its total gross receipts, it will be the duty of said Corporation Commission to fix by an order entered of record such other proportion of its total gross receipts as the proportion upon which said tax shall be computed.” (Italics ours.)*

Undoubtedly this provision fixes the ultimate purpose of the Act; that is, to tax such a percentage of the total gross receipts as the gross receipts within the State bear thereto. The word “receipts” is apparently used in contradistinction to earnings for the purpose of emphasizing the basis upon which the tax is to be calculated.

We insist, therefore, that the contention is clearly manifested to tax the gross receipts from both sources, inter- and intra-state transportation, both as to carriers that operate wholly within the state and those that operate partly within and partly without the state.

It seems to us that the question of the invalidity of this statute is foreclosed by more than one decision of this Court, but particularly by the opinion in the case of the *G. H. & S. A. Ry. Co. v. Texas*, 210 U. S. 217.

We will first consider the Act involved in the light of the Texas case, because the statutes here and there involved are in their material parts substantially identical. The purpose of the Oklahoma statute to levy a *gross revenue tax* is much more forcibly declared in the title to the Act than was the purpose of the Texas statute in the title to that Act. The body of the Texas statute, however, is so similar to the Oklahoma statute in the vital matters, which make it violative of the commerce clause of the federal Constitution, that we herewith reproduce in parallel columns Section 2 of the Oklahoma statute and Section 1 of the Texas statute:

### Oklahoma Act.

"Sec. 2. Every corporation hereinafter named shall pay the *state a gross revenue tax* for the fiscal year ending June thirtieth, nineteen hundred and nine, and for each fiscal year thereafter, which shall be in addition to the taxes levied and collected upon an AD VALOREM basis upon the property and assets of such corporation *equal to the per centum of its gross receipts hereinafter provided, if such public service corporation operate wholly within the state, and if such public service corporation operate partly within and partly without the state, it shall pay tax equal to such proportion of said per centum of its gross receipts as the portion of its business done within the state bears to the whole of its business; provided that if satisfactory evidence is submitted to the*

### Texas Act.

"Sec. 1. Be it enacted by the Legislature of the State of Texas: Every railroad corporation or receiver thereof, and every other person, firm or association of persons, owning, operating, managing or controlling any line of railroad in this state, for the transportation of passengers, freight and baggage, or either, shall pay to the state *an annual tax* for the year 1905, and for each calendar year thereafter, *equal to one per centum of its gross receipts, if such line of railroad lies wholly within the state; if such line of railroad lies partly within and partly without the state, it shall pay a tax equal to such proportion of the said one per centum of its gross receipts as the length of the portion of such line within the state bears to the whole length of such line; provided, that if satisfactory evi-*

*corporation commission at any time prior to the time fixed by this Act for the payment of said tax that any other proportion more fairly represents the proportion which the gross receipts of any such public service corporation for any year within this state bears to its total gross receipts, it shall be the duty of said Corporation Commission to fix, by an order entered of record, such other proportion of its total gross receipts as the proportion upon which said tax shall be computed; and a copy of such order so made and entered of record, as aforesaid, shall be certified to the State Auditor."*

*dence is submitted to the Comptroller, at any time prior to the date fixed in Section 2 of this Act for the payment of the tax herein imposed, that any other proportion more fairly represents the proportion which the gross receipts of any such railroad for any year WITHIN this state bears to its total gross receipts, it shall be his duty to levy and collect for such year from such railroad a tax equal to such other proportion of one per centum of its total gross receipts."*

(Italics ours.)

The difference between these statutes is, that under the Oklahoma statute, where the corporation operates partly within and partly without the state, it is required to pay "a tax equal to such proportion of said per centum of its gross receipts as the portion of its business done within the state bears to the whole of its business," and under the Texas statute it is required to pay "a tax equal to such proportion of the said one per centum of its gross receipts as the length of the portion of such line within the state bears to the whole length of such line."

In both instances the tax is required to be paid upon a sum equal to a certain per centum of the entire gross receipts of the corporation. The rule for measuring the portion of the entire gross receipts differs slightly, but upon the crucial question,

each levies a tax upon a certain portion of the entire *gross receipts*.

We, therefore, submit that that Oklahoma statute falls clearly within the decision of this Court in the case of *G. H. & S. A. Ry. v. State of Texas*, *supra*.

We quote as follows from the opinion of this Court in the last mentioned case (210 U. S. 224), speaking through Mr. Justice Holmes:

"In *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, it was decided that a tax upon the gross receipts of a steamship corporation of the state, when such receipts were derived from commerce between the states and with foreign countries, was unconstitutional. We regard this decision as unshaken and as stating established laws. It cites the earlier cases to the same effect. Later ones are *Ratterman v. Western Union Telegraph Company*, 127 U. S. 411; *Western Union Telegraph Company v. Pennsylvania*, 128 U. S. 39; *Western Union Telegraph Company v. Seay*, 132 U. S. 472. See also *Pullman's Palace Car Company v. Pennsylvania*, 141 U. S. 18, 25; *Ficklen v. Taxing District of Shelby County*, 145 U. S. 1, 22; *New York, Lake Erie & Western R. C. Co. v. Pennsylvania*, 158 U. S. 431, 438; *McHenry v. Alfrod*, 168 U. S. 651, 670, 671. The authority of the Philadelphia Steamship Company case was accepted without question, and the decision was justified by the majority as not in any way qualifying or impairing it. The validity of the distinction was what divided the court.

\* \* \* \* \*

The state must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand, the state cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation in account. That must be done

by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form. (*Stockard v. Morgan*, 185 U. S. 27, 37; *Asbell v. Kansas*, 209 U. S. 251, 254, 256.)

We are of the opinion that the statute levying this tax does amount to an attempt to regulate commerce among the states. The distinction between a tax 'equal to' one per cent of the gross receipts and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute taken by itself. On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the state that another tax on the property of the railroad is upon a valuation of that property taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'

Of course it does not matter that the plaintiffs in error are domestic corporations or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the state."

The effect of the decision of *Galveston, Harrisburg, etc., Ry. Co. v. Texas*, *supra*, was before this Court in the case of *Western Union Telegraph Company v. Kansas*, 216 U. S. 1-24. In the opinion in this case, which is by Mr. Justice Harlan, the following language is used in reference to that case:

"In the recent case of *Galveston, Harrisburg, etc., Ry. Co. v. Texas*, 210 U. S. 217, 227, which involved the validity of the Texas statute imposing an annual tax 'equal to one per centum of its gross receipts' on each railroad lying wholly within that state. The railroads there concerned lay wholly within Texas, but, this court said, they con-

nected with other lines, and a part, and in some instances much the larger part, of their gross receipts were derived from the carriage of passengers and freight coming from or destined to points without the state. The contention by the railroad company was that the tax was a burden on interstate commerce, and invalid so far as it was based on or was measured by receipts derived from interstate transportation. That view was sustained. The court said: 'Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form. (*Stockard v. Morgan*, 185 U. S., 27, 37; *Asbell v. Kansas*, 209 U. S. 251, 254, 256.

'We are of the opinion that the statute levying this tax does amount to an attempt to regulate commerce among the states. The distinction between a tax "equal to" one per cent of gross receipts and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute, taken by itself. On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the state that another tax on the property of the railroad is upon a valuation of that property taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words "equal to."

'Of course it does not matter that the plaintiffs in error are domestic corporations or that the tax embraced indiscriminately gross receipts from commerce within as well as outside of the state.'

We also call the Court's attention to the further quotation from the same opinion (216 U. S. 25) :

"So in *Brennan v. Titusville*, 153 U. S. 289, 303, which involved the validity of an ordinance imposing a license

tax on those engaged in the business of soliciting orders on behalf of manufacturers of goods, the court said (p. 303): 'It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is a direct charge and burden upon the business; and if a state may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible. And notwithstanding the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the state is enabled to say that it shall not be carried on in this way, and to that extent to regulate it.'

Again, in *Ashley v. Ryan*, 153 U. S. 436, 440, the court said (p. 440): 'Whether this charge be viewed as a tax, a license, or a fee, if its exaction violated the interstate commerce clause of the Constitution of the United States, or involved the assertion of the right of a state to exercise its powers of taxation beyond its geographical limits, it was void, whatever might be the technical character affixed to the exaction.' To the same effect is *Caldwell v. North Carolina*, 187 U. S. 622.

The authorities cited show that this court guarded with both diligence and firmness the freedom of interstate commerce against hostile state or local action, as such action has been manifested by regulations operating, in some instances, directly, in others, indirectly, upon the means or instruments employed in that commerce. This has been done without violating the principle that an interstate carrier, entering a state for the purpose of its business, is subject to local regulations that in their essence and purpose only incidentally affect interstate commerce, but are established in good faith for the protection, safety, comfort and convenience of the people, are not in themselves in any real, just sense an obstruction to or in conflict with the substantial rights of those engaged in interstate commerce, but are referable to the police powers of the state, and to be respected until Congress covers the subject by legislation. (*Cooley v. Port Warden*, 12 How. 299, 320; *Sherlock v. Alling*, 93 U. S. 99, 104; *Morgan's Louisiana & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 455, 463; *Smith v. Alabama*, 128 U. S. 96, 100; *N. Y. & N. H. & H. R. R. Co. v. New York*, 165 U. S. 628, 631, 632; *Missouri*,

*Kansas & Texas Ry. Co. v. Haber*, 195 U. S. 613, 626; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 297.) We are aware of no decision by this court holding that a state may, by any device or in any way, whether by a license tax, in the form of a 'fee,' or otherwise, burden the interstate business of a corporation of another state, although the state may tax the corporation's property regularly or permanently located within its limits, where the ascertainment of the amount assessed is made 'dependent in fact on the value of its property situated within the state.' (*Postal Telegraph Company v. Adams*, 155 U. S. 688, 696; *Leloup v. Mobile*, 127 U. S. 640, 649.) On the contrary, it is to be deduced from the adjudged cases that a corporation of one state, authorized by its charter to engage in lawful commerce among the states, may not be prevented by another state from coming into its limits for all the legitimate purposes of such commerce. It may go into the state without obtaining a license from it for the purpose of its interstate business and without liability to taxation there on account of such business."

The opinions of this Court, involving the authority of a state to tax the right to engage in interstate commerce, or to require the payment of a license tax as a condition precedent to the right to engage in interstate commerce within a state, are so numerous that to review the same would unnecessarily prolong this brief. We believe that this Court has uniformly held the levy of a tax upon the right of a corporation to engage in interstate commerce within a state or upon the revenues of a corporation received from interstate transportation, or a charge in the form of a tax for the handling of a passenger or a ton of freight, to be void as in violation of the commerce clause of the federal Constitution.

We will call the attention of the Court to a few of the more important cases which deal with this subject directly and will not attempt to discuss the cases which more generally lay down this principle in dealing with other subjects.

## CRANDALL V. STATE OF NEVADA, 6 WAL. 35.

This case came to this Court on writ of error from the Supreme Court of Nevada, which had sustained the action of the trial court convicting Crandall for the violation of an Act of the Legislature of the State of Nevada which became a law in 1865. This Act levied a tax of \$1.00 upon every person leaving the state by railroad, stage coach, etc. The railroad or coach so transporting the person was required to collect the \$1.00 and pay the same to the state. Crandall, an agent of a stage coach company, engaged in carrying passengers out of Nevada, was arrested for refusing to report the number of passengers and to pay the tax of \$1.00 each. Crandall set up that the statute of Nevada was void as a regulation of and a burden upon commerce between states. This defense was denied by both the trial court and the Supreme Court of Nevada. The Nevada law was held invalid by this Court in an opinion by Mr. Justice Miller concurred in by all of the Justices, except Chief Justice Chase and Mr. Justice Clifford, who concurred in the result, but not in the opinion.

## READING RAILROAD COMPANY V. PENNSYLVANIA, 15 WAL. 232.

This was a suit in the state court by the State against the Railroad Company to recover \$46,520.00, which it claimed against the Railroad Company under an Act of the Legislature of that state approved August 25, 1864. This Act required each railway and steamboat company doing business *within the state*, and which transported freight, to make quarterly a return showing the number of tons of freight carried for the *preceding three months*, and at the time of making such return to pay to the state treasurer of the commonwealth on each two thousand pounds of freight so carried (according to classification) either 2, 3 or 5 cents.

The Company made its return under protest; paid the tax claimed on the intrastate tonnage and refused to pay it on the interstate tonnage. The judgment of the trial court was in favor of the Railway Company, but this judgment was reversed and rendered in favor of the State by the Supreme Court of the State of Pennsylvania, 62 Pa. St. 286. This Court held, the opinion being by Mr. Justice Strong and delivered at the December, 1872, term, that the Pennsylvania statute was void as a regulation of and a burden upon interstate commerce. Justices Swain and Davis dissented upon the ground that the tax was imposed upon the *business* of those required to pay and the tonnage was merely a method of ascertaining the extent of the business.

Two of the concluding paragraphs of the last mentioned opinion are as follows:

"Whatever, therefore, may be the true doctrine respecting the exclusiveness of the power vested in Congress to regulate commerce among the states, we regard it as established that no state can impose a tax upon freight transported from state to state or upon the transporter because of such transportation.

\* \* \* \* \*

The conclusion of the whole is that in our opinion the Act of the Legislature of Pennsylvania of August 25, 1864, so far as it applies to articles carried through the state or articles taken up in the state and carried out of it, or articles taken up out of the state and brought into it, is unconstitutional and void."

#### THE TELEGRAPH COMPANY V. TEXAS, 105 U. S. 460.

A statute of the State of Texas required every telegraph company doing business in the State of Texas to pay a tax of 1 per centum on every full rate message sent and one-half of 1 per cent for every less than full rate message. The tax was in addition to the real and personal property tax and

was required to be paid quarterly to the comptroller of the state. The company refused to pay the tax. Suit was brought in the state court to recover the same. The Supreme Court of the state having sustained the validity of the Act, a writ of error was sued out to the Supreme Court of the United States. The contention of counsel in this Court was that the tax was levied *on the company* on account of messages sent and was to be paid, *not out of the particular revenue received from interstate transportation, but out of the general funds of the company*, and was, therefore, not a regulation of commerce. This contention was denied by this Court and the tax was held to be one upon the commerce of sending messages and violative of the commerce clause of the federal Constitution and void.

PICKARD V. PULLMAN SOUTHERN CAR COMPANY, 117 U. S., p. 34.

This case involved the validity of an Act of the Legislature of the State of Tennessee, which imposed a privilege tax of \$50.00 per annum on every sleeping car or coach used or run over a railroad in Tennessee and not owned by the railroad on which it was run or used. The State demanded, under this statute, of the Pullman Company \$5,700.00, which amount was paid under protest with notice that suit would be brought to recover the same, under the provisions of a state statute permitting such suit to be instituted. The judgment of the trial court was in favor of the Pullman Company for recovery of the amount so paid and writ of error was prosecuted to this Court. The opinion of this Court in the cause was at the December term, 1886, by Mr. Justice Blatchford, all justices concurring. The judgment of the trial court was affirmed and the Tennessee statute was held void as a regulation of and a burden upon interstate commerce.

We quote a short review of some of the preceding cases found in the opinion, in this case, at page 48:

"In the *State Freight Tax Case*, 15 Wall. 232, 281, it was said that a state cannot tax persons for passing through or out of it; that interstate transportation of passengers is beyond the reach of a State Legislature, and that a tax upon it amounts to a tax upon the passengers transported.

In *Railroad Co. v. Maryland*, 21 Wall. 456, 472, Mr. Justice Bradley, in speaking for the court, said that a state cannot impose a tax or duty on the movements or operations of commerce between the states, because it would be a regulation of such commerce 'in a matter which is essential to the rights of all, and, therefore, requiring the exclusive legislation of Congress,' being 'a tax because of the transportation,' and 'therefore virtually a tax on the transportation.'

The decisions in the various cases in this court on the subject of a tax by a state on the bringing in of passengers from foreign countries, and which are collected and commented on by Mr. Justice Miller, in delivering the opinion of this court in the *Head Money Cases*, 112 U. S. 580, 591, show it to be a settled matter that to tax the transit of passengers from foreign countries or between the states is to regulate commerce."

FARGO V. MICHIGAN, 121 U. S. 230.

This case came to this Court from the Supreme Court of Michigan, which had sustained the validity of a gross revenue tax statute of that state, which it held applied to a revenue of \$28,890.00 received from transportation from points within the state to points without the state. The Michigan Act levied a tax of 2½ per cent upon the gross receipts as computed by the Commissioner of Railroads. This decision was rendered on April 4, 1887. The opinion was by Mr. Justice Miller and without dissent. The Act of the Michigan Legislature was held void as a regulation of and burden upon interstate com-

merce, the concluding paragraph of the opinion being as follows:

"The result is so clearly against the statute of Michigan as applied by its Supreme Court that we think the judgment of that court cannot stand."

That the court at that time felt that some misapprehension had arisen from the language which had been used in disposing of previous controversies of a similar character is evidenced by the following from page 240:

"With reference to the utterances of this court until within a very short time past, as to what constitutes commerce among the several states, and also as to what enactments by the Legislature are in violation of the constitutional provision on that subject, it may be admitted that the court has not always employed the same language, and that all of the judges of the court who have written opinions for it may not have meant precisely the same thing. Still we think the more recent opinions of the court have pretty clearly established principles upon that subject which can be readily applied to most cases requiring the constructional provision, and that these recent decisions leave no room to doubt that the statute of Michigan, as interpreted by the Supreme Court in the present case, is forbidden as a regulation of commerce among the states, the power to make which is withheld from the state."

PHILADELPHIA & S. STEAMSHIP CO V. PENNSYLVANIA, 122 U. S. 326.

The most important of all the earlier cases involving the right of a State to tax receipts from interstate transportation is that of *Philadelphia & Southern Steamship Co. v. Pennsylvania*, decided May 27, 1887, and reported in the 122 U. S. 326. This case involved the validity of an Act of the Legislature of Pennsylvania of March 20, 1877, requiring every railroad company, steamship company, etc., doing

business in the said commonwealth to pay to the State Treasurer for the use of the commonwealth a tax of 8-10 of one per centum upon the gross receipts of said company for tolls and transportation. Returns of gross receipts were required under the Act once every six months and the Auditor General thereupon assessed a tax against the carrier upon the basis of 8-10 of one per cent of the gross receipts so returned. The receipts of the steamship company upon which the tax was levied, was, apparently, all from interstate and foreign commerce. A suit was brought on behalf of the State against the steamship company in one of the courts of common pleas of the State. The steamship company pleaded that "no part of such gross receipts was received for transportation of freight and passengers between places within the State of Pennsylvania or for the hire and use of said steamships within the State of Pennsylvania." The agreed statement of facts supported the plea of the company. Judgment was for the commonwealth. The cause was removed on writ of error to the Supreme Court of Pennsylvania and there affirmed. The case was then brought to this Court on writ of error. The opinion was by Mr. Justice Bradley, without dissent. This case is more fully considered in a previous part of this brief, in connection with the decision of the *Galveston, H. & S. A. R. R. Co. v. Texas*, *supra*.

We call attention to the following paragraph thereof, which we consider directly in point here. It is from page 336 and is as follows:

"In view of the decisions of this court, it cannot be pretended that the state could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms. Taxing the transportation, either by its tonnage, or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly

this could not be done by the state without interfering with the power of Congress. Foreign commerce has been fully regulated by Congress, and any regulation imposed by the states upon that branch of commerce would be a palpable interference. If Congress has not made any express regulations with regard to interstate commerce, its inaction, as we have often held, is equivalent to a declaration that it shall be free, in all cases where its power is exclusive; and its power is necessarily exclusive whenever the subject matter is national in its character and properly admits of only one uniform system. See the cases collected in *Robbins v. Shelby Taxing District*, 120 U. S. 489, 492, 493. Interstate commerce carried on by ships on the sea is surely of this character."

WESTERN UNION TELEGRAPH COMPANY V. ALABAMA, 132 U. S. 472.

This case involved the validity of an Act of the Legislature of the State of Alabama, approved December 12, 1884, which levied a tax upon the gross receipts of telegraph companies, electric light and express companies in the state at the rate of \$2.00 on each \$100.00 of gross receipts. The assessment under this statute was made by the assessing board of Alabama. The telegraph company made its return to this board of only gross receipts from intra-state messages. The board rejected this and required a return as to both state and interstate receipts and that taxes be paid thereon. The telegraph company sued out a writ of certiorari from the Supreme Court of the state to the said assessing board. The Supreme Court of Alabama sustained the action of the board (80 Ala. 273) and the case came on writ of error to this Court. The case was decided December 6, 1889. The opinion was by Mr. Justice Miller and concurred in by the other members of the Court. The judgment of the Supreme Court of Alabama was reversed, this Court holding the statute of Alabama, as construed by the court of last resort of that state, a regulation of and a burden upon interstate commerce.

The cases above mentioned cover only a small percentage of the cases decided by this Court holding state action a regulation of and burden upon interstate commerce. We believe they constitute substantially all of the cases involving directly the question here involved.

Before concluding this phase of the matter we desire to call the Court's attention to the thorough, able and exhaustive opinion of the Court of Civil Appeals of Texas in the case of *Galveston H. & S. A. R. R. Co. et al v. Texas*, reported in the 93 S. W. Reporter at page 436, the judgment of which court was affirmed by this Court in the case of *Galveston H. & S. A. R. Co. v. Texas*, 210 U. S. 217.

**The tax levied by the Act involved is not a commutation or excise tax.**

The tax levied by the Act of the Legislature of the State of Oklahoma, the validity of which is here involved, is not intended to be and is not a commutation tax. The title of the Act involved is:

"An Act providing for the levy and collection of a gross revenue tax from public service corporations in this state and from persons, firms, corporations or associations engaged in the mining or production of coal, asphalt, or ores bearing lead, zinc, jack, gold, silver or copper, or of petroleum or other mineral oil, or of natural gas; and declaring an emergency." (Session Laws 1910, page 65.)

Section 2 of this Act provides:

"Every corporation hereinafter named shall pay to the state a gross revenue tax for the fiscal year ending June thirtieth, nineteen hundred and nine, and for each fiscal year thereafter, which shall be in addition to the taxes levied and collected upon an *ad valorem* basis upon the property and assets of such corporation. \* \* \*

Therefore, by the terms of the Act the tax is a "*gross revenue*" tax and is "*in addition*" to the taxes levied and collected upon an *ad valorem* basis.

This Act was approved by the Governor on the 10th day of March, 1910. On the 26th day of May, 1908, the Governor of the State of Oklahoma approved an Act, the title of which is identical to that of the Act here involved. (Session Laws Oklahoma 1907-8, p. 640. This last named Act, approved May 26, 1908, is found in the Compiled Laws of Oklahoma as Sections 7701-2-3-4-5-7-8-9 and 7710 thereof.

Section 2 of the Act involved is identical with Section 2 of the Act approved May 26, 1908. (Compiled Laws 1909, Sec. 7702.)

Section 3 of the Act here involved is identical with Section 3 of the Act approved May 26th, 1908, with the exception that railroads are eliminated from Section 3 in the Act in controversy, and are found in Section 3 of the Act of May 26, 1908. (Compiled Laws of Oklahoma 1909, Sec. 7703.)

Sections 4 and 5 of the Act in controversy are identical with sections of the same number of the Act approved May 26, 1908.

Section 8 of the Act in controversy is identical with Section 7-a of the Act approved May 26, 1908.

Sections 9 and 10, respectively, of the Act in controversy are identical with Sections 8 and 9 of the Act of May 26, 1908.

Section 11 of the Act in controversy is not found in the Act of May 26, 1908.

The Act in controversy is nothing more than a *re-enactment or substitute for the Act approved May 26, 1908*, with the addition of Section 11, directing that the taxes levied and collected thereunder should be paid into the state treasury and applied to the ordinary expenses of State Government. Both

the Act of May 26th, 1908, and that of the 10th of March, 1910 (the last mentioned being the one here involved), purported to levy a *gross revenue* and not a *commutation* tax. The language levying the tax is in each instance identical and is *in addition* to *ad valorem* taxation and not *in lieu* thereof.

It is true that on the 15th day of March, 1910, five days after the approval of the Gross Revenue Act, the validity of which is here involved, the Governor of Oklahoma approved an Act, entitled, "An Act providing for a license tax upon foreign and domestic corporations." (Chap. 57, Session Laws 1910, page 99.) All the *more important corporations* were *in terms exempted* from the provisions of this Act.

Section 2 of the Act is in part as follows:

"Every domestic corporation shall pay a license fee of 50 cents for each one thousand dollars of its authorized capital stock or less, and each foreign corporation shall pay a license fee of one dollar for each one thousand dollars of its capital stock employed in its business done in this state; provided, that the license fees provided for in this Act shall not be required on that portion of its capital stock employed by any corporation in any business upon which a production, income or gross receipts tax is required to be paid under the laws of this state; but any corporation claiming exemption from the payment of the license fees on any portion of its authorized capital shall, in addition to all other statements required by the provisions of this Act, file a statement, under oath, of its president, secretary, or other managing officer, showing in detail the different kinds of business in which it is engaged, and the portion of its capital employed in that part of its business upon which a production, income or gross receipts tax is required to be paid under the laws of this state."

Whether it would be possible for Wells Fargo & Company to secure an exemption from the payment of this tax by showing it had paid the gross revenue tax need not be considered.

To say that this Act, which did not become a law until five days after the Act, the validity of which is here involved, became a law, operated to convert the Act involved into a commutation instead of a gross revenue statute, is an absurdity.

The License Tax Act merely provides that certain corporations which have paid the gross revenue tax may be exempted from the taxes therein imposed, to-wit, the license tax of \$1.00 per thousand on that part of the capital stock of the foreign corporation which is employed in business in the State of Oklahoma.

The tax involved in this case is a distinct tax upon the gross earnings *as such* and without reference to any other tax. It is not substituted for or in lieu of any other tax. The license tax law quoted and relied upon does not permit the payment of the license tax in lieu of this tax; nor does it in fact permit the payment of the gross revenue tax to operate as a discharge of liability to the payment of the license tax. It only permits a remission *pro tanto* of the license tax to the extent of that portion of its capital stock used in business in Oklahoma upon which the gross receipts tax has been paid under the Gross Revenue Law.

Attention is also called to the fact that all property in the State of Oklahoma except that specifically exempted by the Constitution is subject to taxation.

Under Section 5, Article 10, the power of taxation shall never be "surrendered, suspended or contracted away. Taxes shall be uniform upon the same class of subjects."

Section 6 contains the list of the property that may be exempted from taxation.

Sections 12 and 13 of Article 10 prohibits the Legislature from exempting any property from taxation except as provided in the Constitution.

Section 7541 of the Compiled Laws of the State of Oklahoma 1909, provides:

"All property in this state, whether real or personal, including property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation."

Section 7542 of the same statute contains a list of all property exempted from taxation. No property of any public service corporation is exempted. The manner of assessment of the property of public service corporations is prescribed with particularity in Article 4 of Chapter 98 of Compiled Laws of 1909, being Sections 7584 and 7598 thereof.

Section 7590 of the Compiled Laws 1909 prescribes the manner of returning the property of express companies for the purpose of assessment for taxation by the State Board of Equalization.

The basis of assessment of all property in the State is prescribed by Section 8, Article 10, of the State Constitution in the following language:

"All property which may be taxed *ad valorem* shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

It is therefore submitted that the property of express companies is taxed *ad valorem* as is other property in the state; that the Gross Revenue Tax Law here involved levies a gross revenue or gross receipts tax in addition to and *not in lieu* of the *ad valorem* tax provided for; that under no theory can the act here involved be interpreted as levying a commutation tax in lieu of other taxes.

It is clearly a tax upon *receipts as such*, and undoubtedly includes as a basis of division receipts from all sources of transportation.

## AS TO THE CONTENTIONS MADE IN APPELLANT'S BRIEF.

(1) *That the Gross Revenue Tax is in Lieu of a Franchise Tax.*

We have carefully considered the brief of defendant without being able to arrive at any definite conclusion as to what his contentions are as to the nature of the tax involved. On page 7 of his Brief it is stated that the strongest argument that can be made against the Act is derived from the close similarity of a part only of the Oklahoma law, to the Statute of Texas held invalid by this Court in *Galveston H. & S. A. Ry. Co. v. Texas*, 210 United States 217. It is said that the decision in the Texas case was because of the absence "from those laws of the very things present in the Oklahoma law, to-wit: that the Texas Gross Revenue Law was not in lieu or place of any other tax, whereas the Oklahoma Gross Revenue Law is only *instead* of the Corporation Franchise Tax levied in Oklahoma on all corporations not paying the Gross Revenue Tax, but upon none of those paying such tax." We assume, therefore, that the only contention of counsel for defendant upon which it is sought to distinguish the Oklahoma from the Texas Act is that there was absent from the Texas law a provision that the tax levied thereby should be in lieu of another tax, and that the Oklahoma Gross Revenue Law levies a tax only in lieu of the Corporation Franchise Tax levied in Oklahoma on certain corporations not paying the Gross Revenue Tax. If this distinction, therefore, is not sustained, the effect of the brief of counsel for defendant is to admit that this case falls within the principles of the decision in the Texas case (210 Texas 217) and the Act must be condemned as a regulation of and burden upon commerce between the states.

The provision of the statute is:

"Every corporation hereinafter named shall pay the state a gross revenue tax for the fiscal year ending June 30th, 1909, and for each fiscal year thereafter, which shall be in addition to the taxes levied and collected upon an *ad valorem* basis upon the property and assets of such corporations."

The Act specifically provides, therefore, that the tax levied *is in addition to that levied and collected upon the property and assets upon an ad valorem basis*. There is not a line in said Act relating to public service corporations by which any other tax of any character whatsoever is remitted in whole or in part.

Counsel for the defendant says that the real distinction between the Texas and Oklahoma law is:

"That the Oklahoma Gross Revenue Law is only instead of the corporation franchise tax levied in Oklahoma." (Brief, page 8.)

But *there was no* corporation franchise tax law in force in Oklahoma when the Gross Revenue Tax Law was enacted. The Gross Revenue Tax Law was approved, as heretofore noted, on the 10th day of March, 1910, and was but the re-enactment of the same Act of 1908, and the Franchise, or License Tax Law was not approved until the 15th day of March, 1910. There is, therefore, no possible basis upon which to rest the contention that the Gross Revenue Act was in lieu of or in place of the license tax, because the license tax, which it is contended the tax herein levied is in lieu of, had not been created at the time of the approval of the Gross Revenue Act.

The Act referred to by counsel for defendant is "An Act providing for a license tax upon foreign and domestic corporations," and is Chapter 57 of the Session Laws of Oklahoma of 1910.

We do not consider it necessary to further discuss this phase of the matter, as it is fully discussed under the title above set out, to-wit:

"The tax levied by the Act involved is not a commutation or excise tax."

In any event, how would the mere fact that a tax was levied upon receipts from interstate transportation in lieu of a license tax make such levy valid?

(2) *A consideration of the Oklahoma Act in the light of other tax legislation of said state as compared with the Texas Act in the light of other tax legislation in that state.*

It is said in brief of counsel for defendant (page 8), and reference heretofore has been made to the same, that the Texas Gross Revenue Law was not in lieu or place of any other tax. An examination of the Act discloses that Section 6 thereof specifically repeals the existing statute imposing a tax upon the gross passenger earnings of railways. It was insisted that the Texas Act was an occupation tax because the law repealed by Section 6 thereof was an occupation tax. Without going into details it is apparent from a careful examination of the opinion of the Court of Civil Appeals of Texas in the case of *G. H. & S. A. Ry. Co. v. Davidson*, 94 Southwestern 36, 445, that the Texas Act was preceded and followed by substantially the same character of tax legislation as that by which the Oklahoma law was preceded and followed, and the validity of the Texas law was urged by reason of said facts for the very same reasons that are urged in support of the Oklahoma law. This appears from the review of the Texas legislation appearing in the opinion of the Court of Civil Appeals in the Texas case, 93 Southwestern 445. It would therefore serve no useful purpose to undertake to follow the ingenuous argument made by counsel

for defendant, the result of which, so far as we have been able to discern, leads nowhere. It seems to us at times to obscure rather than to clear the issues involved. We submit the opinion of the Court of Civil Appeals of Texas, above referred to, as a complete answer of all the contentions of this character found in the brief of counsel for defendant.

It occurs to us that counsel for defendant has devoted an unnecessary amount of space in his brief to the consideration of Acts of the Oklahoma Legislature, some of which, like the graduated Land Tax Law, have been adjudged invalid, and the enforcement of same perpetually enjoined, and others like the Act entitled "An Act to provide for the taxation of the property, franchises and business of railway companies for state and municipal purposes, Chapter 45 of the Session Laws of 1910," the existence of which has been ignored by the State Board of Equalization, the board charged with the execution of its provisions, undoubtedly on the assumption that it is violative of constitutional principles and void.

(3) *As to the defendant's suggestion that it is the purpose of the Act involved to use the gross receipts as a measure of the value of the property for the purpose of taxation.*

It may be noted that there is absolutely nothing in the Act to indicate any such intention. We quote as follows, however, from the defendant's brief (pages 28 and 29):

"Furthermore, let us remark that the Act according to its own terms is a tax on property measured by receipts, not on receipts.

Its provisions are that 'every corporation hereinafter named shall pay the state a gross revenue tax—for each fiscal year—upon the property and assets of such corporation equal to the per centum of its gross receipts hereinafter provided.'"

It seems from the quotation that in order to bring about this result counsel finds it necessary to strike out the words, "which shall be in addition to the tax levied and collected upon an *ad valorem* basis." This is, we believe, the only method by which such a construction can be arrived at. That is, to strike out the provision "which shall be in addition to the taxes levied and collected upon an *ad valorem* basis." The word "basis" is followed by the language "upon the property and assets of such corporation," without any segregation therefrom by any punctuation mark of any kind. It therefore seems to us that this Court should not do such violence to the language of the Act as to absolutely strike out therefrom the controlling sentence, thereby destroying the patent meaning of the Act in order to accommodate itself to the contentions of counsel for defendant. Not only is the language of the Act incapable of the interpretation contended for by counsel for defendant, but such interpretation would render the Act violative of Section 8 of Article 10 of the state Constitution. That section is in part as follows:

"All property which may be taxed *ad valorem* shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale. \* \* \*

If it was the purpose of the Gross Revenue Act to *tax according to value*, then such taxation would be *ad valorem* and the value could not be guessed off upon a basis of receipts, but would have to be determined in accordance with the constitutional provision. The Legislature has prescribed the method of ascertaining the *ad valorem* value by Section 7590 of the Compiled Laws of 1909—which require an annual return by each express company to the State Board of Equalization under oath of the property owned by such company in the several counties and municipal subdivisions of the state in which it does business.

(4) *As to the defendant's suggestion that this may be considered a privilege or occupation tax.*

It is sufficient to say that upon the face of the Act it does not purport to be either a privilege or occupation tax, nor does it have any of the earmarks of such tax. If it is in fact a privilege or occupation tax upon the right of the complainant to engage in transportation of interstate commerce in the State of Oklahoma, then it is void as a regulation of commerce.

It was said by the Supreme Court of the United States in *Telegraph Company v. Adams*, 155 United States 688:

"It is settled that where by way of duties laid on the transportation of the subject of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce, and cannot be sustained."

See also:

*Pullman Company v. Adams*, 189 United States 420.

*Allen v. Pullman Company*, 189 United States 171.

*Kehrer v. Stewart*, 197 United States 60.

*Western Union Telegraph Company v. Kansas*, 216 United States, page 1.

*Pullman Company v. Kansas*, 216 United States, page 56.

(5) *If the Act involved purported to levy a privilege or occupation tax solely upon the right to do an intra-state business (and certainly it is not so limited), it would be void as a regulation of commerce.*

Under Article 9 of the Constitution of the State, and under Chapter 9 of the Compiled Laws of 1909, common carriers are generally required to transport property in the State of Oklahoma without discrimination, and under the provisions of this article of the Constitution and this chapter of the Compiled

Laws express companies are not at liberty to continue to do an interstate business and refuse to do a state business. If the complainant were at liberty to discontinue its intrastate business, it can be seen from an examination of the bill that it would be required to sacrifice earnings of about \$298,655.00 per annum, leaving a balance of only \$345,955.00 per annum. It is clearly patent that the result of such action would be to directly burden interstate commerce with an expense so great as to in effect destroy the business.

It is therefore respectfully submitted that even though said Act should be held to be a privilege or occupation tax, *which we most strenuously insist it is not*, and to apply to the doing of intra-state business only, *and we insist it is incapable of such interpretation*, still it would be void as a regulation of and burden upon commerce between the states.

*Western Union Telegraph Company v. Kansas*, 216 United States, page 1.

*Pullman v. Kansas*, 216 United States, page 56.

### Conclusion.

In conclusion complainant desires to submit that the title of the Act declares the tax levied to be a gross revenue tax; that the body of the Act makes a direct levy upon a certain percentage of the gross receipts or revenues of complainant as *such*. These receipts include those from both state and interstate earnings as well as those from other sources. The levy fixed by this Act is a *direct imposition of the burden of taxation upon the receipts from transportation from all sources, as receipts*, and is consequently a direct burden upon interstate commerce.

It is not levied in lieu of any other tax and is not a commutation tax. It is not a license tax, and it is not an occupation tax. It is what the Act declares it to be, a tax upon gross receipts *as receipts and not as a measure of property value*.

It is therefore respectfully submitted that under any possible interpretation of the Act it is violative of the Commerce clause of the federal Constitution, and directly burdens commerce among the states. And consequently the judgment of the trial court is right and should be affirmed.

S. T. BLEDSOE,  
*Attorney for Appellee.*

J. R. COTTINGHAM and  
C. W. STOCKTON,  
*Of Counsel.*

**APPENDIX.****HOUSE BILL NO. 76.**

AN ACT providing for the Levy and Collection of a Gross Revenue Tax from Public Service Corporations in this State and from Persons, Firms, Corporations or Associations Engaged in the Mining or Production of Coal, Asphalt or Ores Bearing Lead, Zinc, Jack, Gold, Silver or Copper, or of Petroleum or Other Mineral Oil or of Natural Gas; and Declaring an Emergency.

*Be It Enacted by the People of the State of Oklahoma:*

SECTION 1. As used in this Act, the term "Transportation Company" (shall exclude railroad companies operating steam railroads) in this State, but shall include any freight car company, car corporations or company, trustee, or person engaged in the business of renting, leasing or hiring private cars for the transportation of persons or property and shall include any person, firm, association, company or corporation engaged in the express business.

The term "Transmission Company" shall include any company, corporation, trustee, receiver, or other person, owning, leasing or operating for hire, any telegraph or telephone line or any other instrumentality or means for transmitting messages and communications for hire.

The term "Public Service Corporation Companies," as used in this Act (shall include all transportation and transmission companies), (all gas, electric light, heat and power companies), all water works companies, and all persons, firms, corporations or associations authorized to exercise the right of eminent domain or to use or occupy any right of way, street, alley or public highway, whether along, over or under the same, in a manner not permitted to the general public.

The term "person" as used in this Act shall include individuals, partnerships, associations and corporations in the singular as well as in the plural number.

SECTION 2. Every corporation hereinafter named shall pay the State a gross revenue tax for the fiscal year ending June Thirtieth, Nineteen Hundred and Nine, and for each fiscal year thereafter, which shall be in addition to the taxes levied and collected upon an *ad valorem* basis upon the property and assets of such corporation equal to the per centum of its gross receipts hereinafter provided, if such public service corporations operate wholly within the State; and if such public service corporation operates partly within and partly without the State, it shall pay tax equal to such proportion of said per centum of its gross receipts as the portion of its business done within the State bears to the whole of its business; *Provided*, that if satisfactory evidence is submitted to the Corporation Commission, at any time prior to the time fixed by this Act for the payment of said tax, that any other proportion more fairly represents the proportion which the gross receipts of any such public service corporation for any year within this State bears to its total gross receipts, it shall be the duty of said Corporation Commission to fix, by an order entered of record, such other proportion of its total gross receipts as the proportion upon which said tax shall be computed; and a copy of such order, so made and entered of record, as aforesaid shall be certified to the State Auditor.

SECTION 3. Such gross revenue tax so required to be paid shall be equal to the percentage of the gross receipts of each public service corporation as follows:

Sleeping car companies, stock car companies, refrigerator car companies and other private car associations, car trusts and car companies, any person, firm, association, company or corporation engaged in the express business, three per centum;

pipe line, two per centum; telephone companies, one-half of one per centum; telegraph companies, two per centum; electric light and gas, heat and power companies, one-half of one per centum; water work companies, one-fourth of one per centum. For the purpose of determining the amount of such tax the managing officers or agents of each of such public service corporation shall, on or before the first day of October (nineteen hundred eight) and annually thereafter, report to the State Auditor under oath, the gross receipts of such public service corporation, from every source whatsoever, for the fiscal year ending the Thirtieth day of June, and shall immediately pay to the State Treasurer the gross revenue tax herein imposed, calculated as hereinbefore provided; *Provided, however*, that the State Auditor shall have power to require such public service corporation to furnish any additional information by him deemed to be necessary for the purpose of computing the amount of said tax, and to examine the books, records and files of such corporation; and shall have power to examine witnesses, and if any witness shall fail or refuse to appear at the summons or request of the State Auditor, said State Auditor shall certify the facts, and the name of the witness so failing and refusing to appear, to the District Court, of this State, having jurisdiction of the party, and said court shall thereupon issue a summons to the said party to appear and give such evidence as may be required, and upon a failure so to do the offending party shall be punished as provided by law in cases of contempt, and whenever it shall appear to the State Auditor that any public service corporation has willfully made an untrue or incorrect return of its gross receipts as hereinbefore required, he shall ascertain the correct amount of such gross receipts and shall compute said tax.

SECTION 4. Whenever any public service corporation in this State shall fail to file the report of its gross receipts with-

in the time provided for in this Act, the State Auditor shall forthwith cause an examination to be made into the books and records of such corporation, and shall ascertain the amount of its gross receipts in accordance with the provisions of this Act, and shall compute such gross revenue tax, and shall at the same time tax against said delinquent corporation all costs and expenses incurred on making such examination.

SECTION 5. The tax provided for in section three of this Act shall become delinquent after the first day of October of the fiscal year for which it is levied and shall, as a penalty for such delinquency, bear interest from said date at the rate of eighteen per centum per annum.

SECTION 6. Every person, firm, association, or corporation engaged in the mining, or production, within this State, of coal or asphalt, or of ores bearing lead, zinc, jack, gold, silver or copper, or of petroleum or other mineral oil or of natural gas, shall, within thirty days after the expiration of each quarter annual period, expiring respectively on the last day of June, September, December and March of each year, file with the State Auditor a statement under oath, on forms prescribed by him, showing the location of each mine or oil or gas well, operated by such person, firm, association or corporation, during the last preceding quarter annual period, the kind of mineral, oil or gas; the gross amount thereof produced; the actual cash value thereof and such other information pertaining thereto as the State Auditor may require, and shall at the same time pay to the State Treasurer a gross revenue tax, which shall be in addition to the taxes levied and collected upon an *ad valorem* basis upon such mining, oil or gas property and the appurtenances thereunto belonging, equal to one-half of one per centum of the gross receipts from the total production of coal therefrom; one-half of one per centum of the gross receipts from the total production of ores bearing

lead, zinc, jack, gold, silver or copper or asphalt; one-half of one per centum of the gross receipts from the total production of petroleum, or other mineral oil, or of natural gas; *Provided, however,* that the State Auditor shall have power to require any such person, firm, association or corporation engaged in mining or the production of minerals, to furnish any additional information by him deemed to be necessary for the purpose of computing the amount of said tax, and to examine the books, records and files of such person, firm, association or corporation; and shall have power to examine witnesses, and if any witnesses shall fail or refuse to appear at the summons or request of the State Auditor, said State Auditor shall certify the facts and the name of the witness so failing and refusing to appear to the District Court of this State having jurisdiction of the party, and said court shall thereupon issue a summons to the said party to appear and give such evidence as may be required, and upon a failure so to do the offending party shall be punished as provided by law in cases of contempt. For the purpose of ascertaining whether or not any return so made is the true and correct return of the gross receipts of any such person, firm, association or corporation engaged in mining or the production of minerals, and whenever it shall appear to the State Auditor that any such person, firm, association or corporation engaged in mining or the production of minerals, has unlawfully made an untrue or incorrect return of its gross receipts, as hereinbefore required, he shall ascertain the correct amount of such gross receipts and shall compute said tax; *Provided,* that any such person, firm, association or corporation shall at the time of making its report to the State Auditor set out specifically the amount of royalty required to be paid for the benefit of the Indian Citizen, Indian Tribe or Landlord, and in computing said tax shall pay on the actual cash value of the entire gross production less the royalty paid by such person, firm or corporation.

SECTION 7. The tax provided for in the preceding section shall become delinquent after the date fixed for each quarter-annual report to be filed in the office of the State Auditor and from such time shall, as a penalty for such delinquency, bear interest at the rate of eighteen per centum per annum and shall be collected in the manner hereinafter provided. If any person, firm, association or corporation shall fail to make the report of the gross production of any mine or oil or gas well upon which tax herein provided for within the time prescribed by law for such report it shall be the duty of the State Auditor to examine the books, records and files of such person, firm, association or corporation to ascertain the amount and value of such production to compute the tax thereon as provided herein, and shall add thereto the cost of such examination, together with any penalties accrued thereon.

SECTION 8. When satisfactory evidence under oath is produced to the State Auditor that any person, firm, association, or corporation engaged in mining or producing within this State asphalt, lead, zinc, jack, gold, silver, copper, or petroleum or other mineral oil have in this State manufactured or refined any portion of such products in this State and thereafter on the finished products have paid *ad valorem* taxes, the State Auditor is hereby authorized to rebate and pay to such person, firm, association or corporation the just proportion of taxes paid by said person, firm, association or corporation, on his or its crude productions under Section six of this Act, which shall have been found to have been turned into finished product as aforesaid, and cause such sum, if any, so rebated, to be repaid by warrant drawn on the State Treasurer.

SECTION 9. When any tax provided for in this Act shall become delinquent the State Auditor shall issue his warrant directed to the sheriff of any county wherein the same, or any part thereof, accrued, and the sheriff to whom said warrant

shall be directed shall proceed to levy upon the property, assets and effects of the person, firm, association or corporation against whom said tax is assessed and to sell the same and to make return thereof as upon execution.

SECTION 10. Any person who shall make any false oath to any report required by the provision of this Act shall be deemed guilty of perjury.

SECTION 11. All taxes levied and collected under the provisions of this Act shall be paid into the State Treasury and applied to the payment of the ordinary expenses of the State government.

BEN F. WILSON,

*Speaker of the House of Representatives.*

J. C. GRAHAM,

*President Pro Tempore of the Senate.*

Approved March 10th, 1910.

C. N. HASKELL,

*Governor of the State of Oklahoma.*

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Office Supreme Court, U. S.  
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IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

OCTOBER TERM, 1911

LEO. MEYER, AS AUDITOR OF  
THE STATE OF OKLAHOMA,

Appellant,

No. 624

vs

WELLS FARGO & COMPANY,

Appellees

On Appeal From the Circuit Court of the United  
States for the Western District of Oklahoma.

**Reply Brief of Appellant**

CHAS. WEST,  
Solicitor For Appellant



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**Reply Brief of Appellant**

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Appellant desires to refer the court to the well considered case of State vs. United States Express Co., 131 N. W. 489 (Minn.) heard at this time, and to the authorities named in that opinion, particularly State vs. Northwestern

Telephone Exchange Co., 120 N. W. 534 (Minn.). They are instances of a tax estimated in relation to receipts which however is a tax on the property, only measured by the receipts, such as we claim is the Oklahoma law.

The only difference in principle from the Oklahoma act is that it, like the Texas Intangible Asset Tax mentioned in 93 S. W. 433, has an especial property tax for corporations of intangible value in addition to the ordinary ad valorem or general property tax.

All the reasoning of the Texas case instead of answering the arguments made for the Oklahoma law does but add to the strength of that argument.

Let us summarize it:—

1. In *G. H. & S. A. vs. Davidson*, 93 S. W. 433, p. 445, it is pointed out that by section 7 of the Texas act that the tax imposed by the act shall not be levied upon any concern having paid the tax on intangible assets. Oklahoma has no such provision.

2. On page 446-7 it is pointed out that the Texas act was passed at the same time a similar tax on telegraph and telephone companies was enacted (the Kennedy bill). That in the latter a tax was definitely placed on gross receipts and no loophole to any other construction is offered by the words "equal to" or other words. No such equivalent to the "Kennedy bill" exists in Oklahoma.

3. It appears from p. 447 of that opinion that the word "occupation" appeared in the title of the Texas act as introduced as descriptive of the tax thereby imposed, but that this word was afterwards stricken out. We know of no such fact as to the Oklahoma Act.

4. Also Section 12 of the Texas intangible asset law referred to laws laying taxes upon the gross receipts which the court found referred to the Texas Gross Revenue Tax Law. No such reference to the Oklahoma law as "a tax laid on gross receipts" can be found.

For these reasons was the holding of the

Texas Court of Civil Appeals. None of them exist in the case of the Oklahoma law. On the contrary the light shed by the statutes passed relating to the same subject all indicate that this statute was intended to be a tax levied on property, an equivalent of the Texas Intangible Asset Tax.

An examination of Chapter 146 Texas Session Laws of 1905, p. 351, (Intangible Asset Tax) shows many points of similarity with the Oklahoma Gross revenue tax except that the latter is based solely on the receipts while the former (like the railroad tax law of Oklahoma of 1910, Chap. 45) is based on revenue and other things also. This Texas law must have been in the minds of the Oklahoma legislature.

Respectfully submitted,

CHAS. WEST,  
Solicitor for Appellant.